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ROBERT L., a minor, by his father
and next friend, ANDREW LOCK,

Appellee,

v.

CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, a corporation and CLAUDE
A ROTH, accessor Trustee.

CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

248

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MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant seeks to reverse a judgment for \$3,000 entered on the verdict of a jury for personal injuries sustained by plaintiff, a minor, eleven years of age. The jury also found, in response to a special interrogatory submitted by defendant, that plaintiff exercised that degree of care which a boy of his age, intelligence, capacity and experience would have exercised for his safety under the conditions shown by the evidence. Defendant's motion for judgment notwithstanding the verdict, and in the alternative for a new trial, were denied.

Facts necessary to an understanding of the case may be summarized as follows: On June 1, 1944 at about 4:00 P.M. plaintiff, eleven years of age, was walking west on the north side of Thacker Street in the Village of Des Plaines on his way home from school. Thacker Street is a twenty-foot country gravel road located on the western outskirts of the Village. Three of defendant's tracks which run generally north and south intersect Thacker Street and are used by freight trains only. The westernmost track continues due north. Immediately to the east are two mainline tracks which make a long sweeping curve toward the east, north of Thacker Street.

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THE RESTATEMENT OF THE LAW OF CONTRACTS AND THE RESTATEMENT OF THE LAW OF TORTS

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The most easterly main track is used for southbound trains and the other main track for northbound trains. The space between the tracks on Thacker Street is paved with concrete blocks. At the intersection there are two standard crossbuck signs on the approaches to the crossing. No watchman, gates, or electric crossing signals are maintained there.

When the plaintiff reached the railroad crossing a long freight train was proceeding north on the westerly main track. As the train was going by, Robert Lock was standing on or near the easterly track facing west or southwest. While plaintiff was watching the northbound train a southbound train, on the most easterly track consisting of a freight engine and caboose, struck plaintiff, causing the injuries complained of.

At the close of plaintiff's case the complaint was amended by charging in substance that defendant negligently operated the locomotive at a dangerous rate of speed; that defendant negligently failed to maintain a proper lookout for persons at or near the tracks; that defendant's servants failed to keep the locomotive under proper control; and that defendant's agents carelessly drove the locomotive into plaintiff, although plaintiff was in full view for a sufficient time for the locomotive to have been stopped before the impact.

Robert Lock testified substantially as follows: On the day of the occurrence he had boarded a bus at Saint Mary's School in Des Plaines and alighted at Thacker Street and Wolf Road. Thereupon he walked west on the north side of Thacker Street for approximately two and a half blocks to the defendant's railroad tracks. As he neared the tracks the front of the northbound train was about twelve or fifteen cars north of Thacker Street. He looked north, then south, and then north again. He did not see a

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southbound train. Immediately afterward he looked south "sort of on a southwest angle." He stood looking "toward the end of the caboose" for about two and a half minutes, when he was struck by the southbound train. He did not see the southbound train before he was struck, nor did he hear "whistles" or "noise."

He further testified that the northbound train was making "an awful lot of noise" as the cars passed by the intersection. At the time he was struck he was standing about one foot east "of the first rail of the first set of tracks" on the north side of Thacker Street. For about a year before the accident plaintiff had walked across defendant's tracks about twice a day. During this period he had never observed an occasion where two trains were crossing Thacker Street in opposite directions, nor had he ever observed a train going south "on the first (most easterly) track." On Cross-examination he testified that the north view along the track all the way to Wolf Road was unobstructed.

Sidney Munson, fireman, called in behalf of the defendant, testified that the crew of the southbound train consisted of himself, the engineer Fred Bassett, Albert Johnson, head brakeman, Roy Paris, conductor, and Herman Smale, Brakeman; that at the time of the occurrence Johnson sat directly behind him in the locomotive cab, while the conductor, Roy Paris, and the brakeman, Herman Smale, rode in the caboose.

Munson further testified that as the train approached Thacker Street it was traveling about twenty-five miles an hour and the bell was ringing. The witness was seated on the left in the locomotive cab. When the southbound train was 280 or 300 feet north of Thacker Street Munson "noticed something in the shadow where there was a train passing going in the opposite direction," which turned out to be the plaintiff standing between the main south and northbound tracks. He "hollered" to the engineer who

southbound train. Immediately after and he looked south east of on a southwest angle. He stood looking toward the end of the "exposed" for about two and a half minutes, when he was struck by the southbound train. He did not see the southbound train before he was struck, nor did he hear "whistles" or horns.

He further testified that he was standing on the platform.

making an actual lot of noise, as the train was moving. At the time he was struck he was standing about two feet from the first rail of the first set of tracks, on the north side of Thacker Street. There was a great silence at the time of the accident. He had raised a great deal of dust, about a foot high, and this period he had never observed an occasion before. Two engines were passing Thacker Street in opposite directions, north and south, at the time. He never observed a train going south on the first set of tracks. On cross-examination he testified that he was standing along the track all the way to the south end of the track.

Edney Johnson, witness, called in behalf of the plaintiff,

testified that one crew of the southbound train consisted of a driver, the engineer Fred Jensen, Albert Johnson, and a brakeman, as

Faris, conductor, and Herman, fire, brakeman; that at the time of

the occurrence Johnson sat directly behind him in the locomotive

cab, while the conductor, Fred Jensen, and the brakeman, Herman

Faris, rode in the engine.

Johnson further testified that as the train approached

Thacker Street it was traveling about twenty-five miles an hour

and the bell was ringing. The witness was seated on the left in

the locomotive cab. When the southbound train was 200 or 300

feet north of Thacker Street Johnson "noticed something in the shadow

where there was a train passing going in the opposite direction,"

which turned out to be the plaintiff standing between the main

south and northbound tracks. He "hollored" to the engineer who

applied the emergency brakes and blew the whistle. When the locomotive struck plaintiff it was traveling about ten miles an hour. When the train came to a stop the caboose appeared to be about forty feet south of the Thacker Street crossing. On cross-examination Munson testified that at the time of the accident "the visibility was good and clear".

Fred Bassett, the engineer, called by the defendant, testified that as the train was approaching Thacker Street he was seated in the engine cab on the right hand side; that at Wolf Road they were going between twenty-five and thirty miles an hour and the bell was ringing continuously; when the train reached within eight car lengths of Thacker Street the fireman hollered "Blow the whistle"; "I blew the whistle. I blew the whistle so loud it stuck open"; that he immediately applied the emergency brakes and came to a full stop; that when the train was two or three car lengths from the crossing, "I noticed this boy almost outside of the tie, which is twenty-eight inches off the rail; he was on the west rail of my (southbound) track."

The witness further testified that at the time he applied the emergency brake his view of Thacker crossing was obstructed by the locomotive boiler; that "I was depending on my fireman, Munson, to observe the traffic ahead"; and that he could stop the train in about 420 feet.

Albert Johnson, head brakeman, called by defendant, testified that the whistle first sounded 250 feet or 300 feet before the crossing at Thacker Street; that the fireman called to the engineer to apply emergency brakes, which he did. Witness said he did not see plaintiff before he was struck by the locomotive.

Herman Smale, brakeman, called by the defendant, testified that he was riding on the back platform of the caboose, inspecting the passing northbound freight train. When the locomotive was seven or eight car lengths from Thacker Street the whistle blew and the

applied the emergency brakes and blew the whistle. When the locomotive struck plaintiff it was traveling about ten miles an hour.

When the train came to a stop the caboose appeared to be about

forty feet south of the Thacker Street crossing. On cross-

examination Hanson testified that at the time of the accident

"the visibility was good and clear."

First witness, the engineer, called to the attention of

testified that at the time the locomotive was about to

started in the engine car on the right hand side; that he

heard they were going between twenty-five and thirty miles an

hour and the bell was ringing continuously; when the train reached

within about ten feet of the crossing he saw the locomotive

"blow the whistle"; "I also saw the whistle blow the whistle as

loud as a steam horn"; that he immediately applied the emergency

brakes and came to a full stop; at which time the train was two or three

car lengths from the crossing; "I noticed this boy almost outside

of the tie, which is twenty-eight inches off the rail; he was on

the west rail of my (neighborhood) track."

The witness further testified that at the time he applied

the emergency brakes his view of Thacker Street was obstructed by

the locomotive boiler; that "I was depending on my fireman, Hanson,

to observe the traffic ahead"; and that he could stop the train in

about 400 feet.

Albert Johnson, head brakeman, called by defendant, testi-

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the crossing at Thacker Street; that the fireman called to the

engineer to apply emergency brakes, which he did. Witness said he

did not see plaintiff before he was struck by the locomotive.

Herman Smith, brakeman, called by the defendant, testified

that he was riding on the back platform of the caboose, inspecting

the passing northbound freight train. When the locomotive was seven

or eight car lengths from Thacker Street the whistle blew and the

brakes went on in emergency simultaneously. He heard steam blowing and when the train passed the crossing he saw plaintiff lying between "the main lines."

Roy Paris, conductor, called in behalf of defendant, testified he was riding in the caboose; that he heard the whistle blowing about 300 feet north of Thacker Street and noticed the grinding of brakes; that he saw the left-side blow-off cock "blowing"; that he "tried to peer through it" but could see nothing ahead; that as he looked through a window on the other side of the caboose he saw plaintiff lying near the tracks as the train went by.

John H. Boeckenhauer, called by defendant, testified that he owned a 70-acre farm near the scene of the accident; that at the time of the accident he was driving a tractor which was drawing a plow about 50 feet east of defendant's right-of-way and 200 feet south of Thacker Street; that he observed a boy walking west on Thacker Street as a freight train was going north. Shortly thereafter he saw an "engine and caboose coming around the curve, whistling and blowing steam on the left side"; that he saw the plaintiff "get hit by the southbound train"; and that at the time plaintiff was struck the northbound train was still crossing Thacker Street "making a lot of noise."

Elsie Heimgaertner, testifying in behalf of the defendant, stated that while she was riding a bicycle west on Thacker Street she noticed a long freight train going north, also an engine and caboose going south; that the whistle of the southbound train was blowing "long and shrilly" at the time the southbound locomotive reached the Thacker Street crossing.

Defendant's first contention is that the evidence fails to establish negligence charged in the complaint as amended. With reference to the allegation that defendant negligently operated

brakes went on in emergency simultaneously. He heard steam blowing and when the train passed the crossing he saw plaintiff lying between the main lines."

Ray Harris, conductor, called in behalf of defendant, testified he was riding in the caboose; that he heard the whistle blowing about 300 feet north of Thacker street and noticed the crossing of tracks; that he saw the left-side light look "blowing"; that he "tried to look through it" but could see nothing ahead; that as he looked through a window on the other side of the caboose he saw plaintiff lying near the tracks as the train went by.

John A. Hahnemann, called by defendant, testified that he owned a 70-acre farm near the scene of the accident; that at the time of the accident he was driving a tractor which was drawing a plow about 50 feet east of defendant's right-of-way and 300 feet north of Thacker street; that he observed a boy walking west on Thacker street as a freight train was going north. Shortly thereafter he saw an engine and caboose coming around the curve, whistling and blowing steam on the left side; that he saw the plaintiff "get hit by the southbound train"; and that at the time plaintiff was struck the northbound train was still crossing Thacker street "making a lot of noise."

Miss Hahnemann, testifying in behalf of the defendant, stated that while she was riding a bicycle west on Thacker street she noticed a long freight train going north, also an engine and caboose going south; that the whistle of the southbound train was blowing "long and shrilly" at the time the southbound locomotive reached the Thacker street crossing.

Defendant's first contention is that the evidence fails to establish negligence charged in the complaint as amended. With reference to the allegation that defendant negligently operated

its locomotive at a high and dangerous speed, the undisputed evidence is that defendant's train as it came around the curve never exceeded thirty miles an hour and that it passed the Thacker Street crossing traveling about ten or fifteen miles an hour. The vicinity of the occurrence was sparsely settled. Plaintiff resided on a farm several blocks west of the crossing.

In Nice v. Illinois C. R. R. Co., 303 Ill. App. 292, it appears that a motorist was struck at a grade crossing by a passenger train traveling ninety miles an hour while passing through a small village. The court said, at page 297:

"It is hard for this court to say in this day and age, and under the circumstances proven in this case how it can determine that it is negligence per se to operate a train at the rate of 90 miles per hour through the village of Chestnut."

To the same effect is Carrell v. The New York Central R. Co., 384 Ill. 599.

In the instant case there appears to be no ordinance of the Village of Des Plaines, or statute, regulating the speed at the place where the accident occurred; nor was there any evidence tending to show that the speed at which the southbound train moved was unusual or dangerous. Moreover, according to plaintiff's testimony, his attention was fixed upon the passing northbound train as he stood at the crossing with his back turned to the oncoming southbound train. It is undisputed that he was oblivious to all warning signals of the southbound train. Under these circumstances the speed of the train was not the proximate cause of the accident. (De Wildt v. Thomson, 241 Wis. 352, 6 N. W. (2d) 173.) We do not think there was any evidence which would warrant a jury to base a verdict of negligence upon the allegation of the complaint that the locomotive was operated at a high and dangerous speed.

As to the other charges in the amended complaint, plaintiff's counsel maintain that Munson, the fireman, had a full view of Thacker Street when the locomotive was at least 707 feet north of the crossing

and that in the exercise of reasonable care Munson and other members of the train crew should have seen plaintiff in time to stop the train before striking him. It appears that defendant introduced in evidence a chart (Def't's Ex. 6) showing Thacker crossing and the railroad tracks extending north. On cross-examination plaintiff's counsel, Mr. Barbera, had the witness Munson place a cross on the chart representing the spot where the southbound locomotive was when Munson had a full vision of Thacker Street for the first time. Plaintiff's counsel argues that the distance between the point indicated by the cross on the chart and the Thacker Street crossing, according to the scale on which the chart is drawn, is 707 feet. Munson testified that at the time he first had a full view of the north half of Thacker Street he did not see plaintiff; that he was not familiar with the reading of blue prints, and did not know whether the cross he put on the blue print at plaintiff's counsel's request was 280 feet away.

Munson also testified: "I first saw the crossing distinctly that day in the vicinity of eight or nine car lengths of the crossing." Manifestly, in marking the spot on the chart where the locomotive was with reference to Thacker Street, Munson was confused because of his unfamiliarity with defendant's charts. But the question whether upon all the evidence Munson or other members of the train crew in the exercise of ordinary care could have observed the plaintiff at the crossing and stopped the train so as to avoid striking him was for the jury to determine.

We think there is evidence tending to prove the remaining charges in the amended complaint and therefore the court was justified in denying defendant's motion for a judgment notwithstanding the verdict of the jury.

Criticism is leveled by defendant at plaintiff's given instruction number 7 which incorporated the charge in the complaint

and that in the exercise of reasonable care against any other persons
of the train crew should have been sufficient in time to stop the
train before striking him. It appears that defendant introduced
in evidence a chart (Ex. 5) showing track crossing and
the railroad tracks extending north. On cross-examination plain-
tiff's counsel, Dr. Hartman, had the witness Hanson find a cross
on the chart representing the spot where the two railroad locomotives
was when Hanson had a full vision of the train. That for the first
time. Plaintiff's counsel argues that the distance between the
point indicated by the cross on the chart and the track where
crossing, according to the scale on which the chart is drawn, is
707 feet. Hanson testified that at the time he first had full
view of the north end of the train, he did not see plaintiff;
that he was not talking with him and was a little blind, and did
not know whether the cross he saw on the chart was of plaintiff's
counsel's request was 280 feet away.
Hanson also testified: "I first saw the crossing distinctly
that day in the vicinity of eight or nine o'clock in the morning."
Manifestly, in seeking the spot in the chart where the locomotive
was with reference to the track, Hanson was confused because
of his unfamiliarity with defendant's chart. But the question
whether upon all the evidence Hanson or other members of the train
crew in the exercise of ordinary care could have observed the plain-
tiff at the crossing and stopped the train so as to avoid striking
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We think there is evidence tending to prove the remaining
charges in the amended complaint and therefore the court was
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the verdict of the jury.
Circumstances are leveled by defendant at plaintiff's given
instruction number 7 which incorporated the charge in the complaint.

that defendant's locomotive was driven at a "dangerous rate of speed." Since we hold that the speed of the train was not the proximate cause of the accident this charge in the complaint should have been eliminated and the jury instructed to disregard it. We think this instruction is particularly harmful to defendant because plaintiff relies on the testimony of Munson, which is not clear, to establish negligence on the part of defendant. It may well be that the jury in determining the liability of defendant were misled in believing that the speed at which the train was proceeding was dangerous and unreasonable. Similar instructions have been disapproved in Goldberg v. Capitol Freight Lines, Ltd., 314 Ill. App. 347, and Lotsplech v. Continental Ill. Nat. Bk. & Tr. Co. 316 Ill. App. 482. Under the facts and circumstances of this case we think the giving of plaintiff's instruction number 7 warrants a reversal of the judgment.

Defendant also urges that the trial court erred in denying its petition and bond for removal to the United States District Court on the ground of diversity of citizenship. Defendant Chicago and North Western Railway Company is a Wisconsin corporation. In the suit as originally brought Charles M. Thomson, Trustee, was joined with the Railway Company as party defendant. On February 21, 1945 defendant corporation presented to Judge Harry Fisher its bond and petition for removal which was allowed. Thereafter defendant filed a certified copy of the Circuit Court record in the District Court of the United States for the Northern District of Illinois, Eastern Division, and answered the complaint herein in the District Court. Charles M. Thomson died and Claude A. Roth was appointed Successor Trustee of the defendant Railway. Plaintiff made Claude A. Roth, Successor Trustee a codefendant in lieu of Thomson. Roth was a citizen and resident of the State of Illinois. On March 23, 1945, the United States District Court remanded the case to the Circuit Court. At the close of plaintiff's evidence defendant filed

that defendant's locomotive was driven at a "dangerous rate of speed." Since we hold that the speed of the train was not the proximate cause of the accident this charge in the complaint should have been eliminated and the jury instructed to disregard it. We think this instruction is particularly harmful to defendant because plaintiff relies on the testimony of Munson, which is not clear, to establish negligence on the part of defendant. It may well be that the jury in determining the liability of defendant were misled in believing that the speed at which the train was proceeding was dangerous and unreasonable. Similar instructions have been disapproved in Goldberg v. Capital Transit Lines, Inc., 114 Ill. 2d 347, and Leibach v. Continental Ill. Nat. Bk. & Tr. Co., 316 Ill. 488. Under the facts and circumstances of this case we think the giving of plaintiff's instruction number 7 warrants a reversal of the judgment. Defendant also urges that the trial court erred in denying its petition and bond for removal to the United States District Court on the ground of diversity of citizenship. Defendant catalogs and North Western Railway Company is a "foreign corporation." In the suit as originally brought Charles M. Thomson, trustee, was joined with the Railway Company as party defendant. On February 21, 1943 defendant corporation presented to Judge Harry Fisher its bond and petition for removal which was allowed. Thereafter defendant filed a certified copy of the Circuit Court record in the District Court of the United States for the Northern District of Illinois, Eastern Division, and answered the complaint herein in the District Court. Charles M. Thomson died and Claude A. Roth was appointed Successor Trustee of the defendant Railway. Plaintiff made Claude A. Roth, Successor Trustee a codefendant in lieu of Thomson. Roth was a citizen and resident of the State of Illinois. On March 23, 1944, the United States District Court remanded the case to the Circuit Court. At the close of plaintiff's evidence defendant filed

a second petition for removal. It appears that Claude A. Roth, Trustee was released and discharged on May 31, 1944 and that the accident upon which the present suit is predicated occurred on June 1, 1944. During the hearing of plaintiff's case Roth was dismissed as party defendant on motion of plaintiff.

Defendant argues that since Roth was dismissed from the suit leaving only defendant corporation the cause should be sent back to the District Court again. We think the second petition for removal comes too late. Roth was discharged as trustee a year and a half before the present suit was tried. The petition and bond for removal was not seasonably presented and was therefore properly denied.

Since this case must be retried we think it is unnecessary to consider the other points raised.

For the reasons given, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

KILEY AND BURKE, JJ. CONCUR.

a second petition for removal. It appears that Claude A. Roth,

Trustee was released and discharged on May 31, 1944 and that

the resident upon which the removal suit is predicated occurred

on June 1, 1944. During the hearing of plaintiff's case both

was dismissed as party defendant on motion of plaintiff.

Defendant argues that since Roth was dismissed from

the suit leaving only defendant corporation the same should be

sent back to the District Court again. We think the second petition

for removal comes too late. Roth was discharged as trustee a

year and a half before the removal suit was filed. The petition

and bond for removal was not seasonably presented and was therefore

properly denied.

Since this case must be retried we think it is unnecessary

to consider the other points raised.

For the reasons given, the judgment is reversed and the

cause remanded for a new trial.

REVEREND AND HONORABLE FOR THE TRIAL.

KIMM AND BURKE, J. J. HONOR.

43824

ALOYSIUS M. CARROLL,

Appellee,

v.

THOMAS J. FRIEL and CHARLES C. RENSHAW,
as Trustees, etc., et al., doing
business as CHICAGO SURFACE LINES,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

332 I.A. 24/8 134²

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant seeks to reverse a judgment for \$5,000 entered on the verdict of a jury in an action for personal injuries alleged to have been sustained by plaintiff, a pedestrian, when he was struck at a crosswalk by defendant's street car. Motions for judgment notwithstanding the verdict and in the alternative for a new trial were overruled.

The complaint alleges in substance that on March 23, 1943, while crossing Ashland Avenue on the north crosswalk of 18th Street in the City of Chicago, plaintiff was struck by a northbound Ashland Avenue street car; and that defendant negligently operated the street car in that it failed to yield unto the plaintiff his right of way, failed to keep a proper outlook for the plaintiff, and disregarded the traffic control lights.

In their answer defendant denied that the street car in question was being operated in a northerly direction and that on the occasion in question the plaintiff was crossing Ashland Avenue on a crosswalk or at the intersection.

Defendant's theory is that plaintiff undertook to cross from the east to the west side of Ashland Avenue at a point more than 100 feet north of the north crosswalk of 18th Street; that he crossed in front of two northbound trucks which were brought to a stop to avoid striking him; and that he continued on into

ALDOUS M. CARROLL,

Appellee,

v.

THOMAS J. ELLIS and CHARLES C. HANSEN,
as Trustees, et al., doing
business as CHICAGO TRUSTEES LIMITED,

Appellants.

APPEAL FROM

CIRCUIT COURT

COCK COUNTY.

MR. PRESIDING JUSTICE LEWIS RED THE CHIEF OF THE COURT.

Defendant seeks to reverse a judgment for \$,000

entered on the verdict of a jury in an action for personal injuries alleged to have been sustained by plaintiff, a pedestrian, when he was struck at a crosswalk by defendant's street car. Motion for judgment notwithstanding the verdict and in the alternative for a new trial were overruled.

The complaint alleges in substance that on March 28,

1943, while crossing Ashland Avenue on the north crosswalk of 18th Street in the City of Chicago, plaintiff was struck by a northbound Ashland Avenue street car; and that defendant negligently operated the street car in that it failed to yield unto the plaintiff his right of way, failed to keep a proper outlook for the plaintiff, and disregarded the traffic control lights.

In their answer defendant denied that the street car in question was being operated in a northerly direction and that on the occasion in question the plaintiff was crossing Ashland Avenue on a crosswalk or at the intersection.

Defendant's theory is that plaintiff undertook to cross from the east to the west side of Ashland Avenue at a point more than 100 feet north of the north crosswalk of 18th Street; that he crossed in front of two northbound trucks which were brought to a stop to avoid striking him; and that he continued on into

the side of a southbound street car as it was approaching the safety island located on the west side of Ashland Avenue and north of 18th Street.

The record discloses that the accident occurred on March 23, 1943 at 2:45 o'clock p.m. It was a clear day and the pavement was dry. At the intersection of 18th Street, Ashland Avenue is 70½ feet wide and 18th Street is 38½ feet wide. Both highways have street car tracks in the center thereof and traffic signal lights at each corner. The safety island is 100 feet long and 4½ feet wide and is located 2 feet 4 inches west of the westerly rail of the southbound street car tracks and the south end of the safety island is 4 feet 8 inches north of the north crosswalk of 18th Street.

Plaintiff and one John Morz were the only occurrence witnesses testifying in behalf of the plaintiff. Morz testified substantially as follows: that he was born and reared in the vicinity of the accident; that on the day of the occurrence he was standing at the front end of the safety island on the west side of Ashland Avenue "right off 18th Street, that would be at the south end where you get off the southbound car, right at the corner"; he was facing east waiting for a southbound car; "when the light changed I noticed the street car come by; when I saw Mr. Carroll for the first time he was about in the first rail on the northbound track when it hit him * * * he was going west on the north side of 18th Street, I guess * * * As I was facing east the light changed, it was amber color, and when the street car came full force on 18th Street going north * * * the left hand side of the street car hit him; the impact did not occur in the crosswalk, it was about fifteen feet from the crosswalk * * * he was laying right in the center of the street off the middle section of the car line."

The side of a southbound street car as it was approaching the safety island located on the west side of Highland Avenue and north of 18th Street.

The record discloses that the accident occurred on March 25, 1943 at 2:45 o'clock p.m. It was a clear day and the pavement was dry. At the intersection of 18th Street, Highland Avenue is 70 feet wide and 18th Street is 50 feet wide. Both highways have street car tracks in the center between two traffic signal lights at each corner. The safety island is 100 feet long and 4 1/2 feet wide and is located 2 feet 4 inches west of the westerly rail of the southbound street car tracks and the south end of the safety island is 4 feet 3 inches north of the north crosswalk of 18th Street.

Witnesses testifying in behalf of the plaintiff, were testified to the following: That he was standing in the vicinity of the accident; that on the day of the occurrence he was standing at the front end of the safety island on the west side of Highland Avenue "right off 18th Street, that would be at the south end where you get off in southbound cars, right at the corner"; he was facing east waiting for a southbound car; when the light changed he noticed the street car come by; when he saw Mr. Carroll for the first time he was about in the first rail on the northbound track when it hit him; he was going west on the north side of 18th Street, I know * * * as I was facing east the light changed, it was amber color, and when the street car came full force on 18th Street going north * * * the left hand side of the street car hit him; the impact did not occur in the crosswalk, it was about fifteen feet from the crosswalk * * * he was laying right in the center of the street off the middle section of the car line."

On cross-examination the witness testified: "I was standing on the north end of the southbound safety island, waiting for the street car going south; I had been standing on the safety island six or seven minutes, facing east."

The witness further testified on cross-examination that he did not notice plaintiff "until the street car come by; I happened to look up and the street car come right in front of him and hit him; when I first saw Mr. Carroll he was up to the east rail of the northbound track, that is the first time I saw him * * * As the street car went through the light, he went full force and crossed there * * * I saw the street car run through the light; there was a few trucks going north; I saw Mr. Carroll when I saw the street car coming and he was at the east rail of the northbound track, he was on the crosswalk running from east to west on the north side of 18th Street * * *; at the time the street car struck him he was in the center of the street; it hit him right at the crosswalk and knocked him fifteen or twenty feet."

Plaintiff testified that for 27 years he had been employed as an asphalt inspector in the City of Chicago; that he is familiar with the intersection at Ashland and 18th Street; on the day of the occurrence he was going home from work; when he reached the northeast corner of the intersection he looked at the signal at the southwest corner; observing a green light he started to cross the street to the northwest corner walking on the crosswalk; "When I just about stepped on the first and second rail in the middle of the track I heard a rumble; I didn't know what was making the noise until I looked and saw the street car almost on top of me and five or ten feet away at the most; I got excited and I jumped; the next thing I recall after that I woke up in the County Hospital where I stayed for seven or eight days." Afterward the

plaintiff was removed to Alexian Brothers Hospital where he remained for a week. Upon leaving the hospital plaintiff remained in bed at home for two weeks and went back to work about May 1st, "just about a month after the accident." During his absence plaintiff's salary was paid by the City of Chicago.

Six witnesses testified in behalf of the defendant. Kenneth Personius, called by the defendant, testified that he was a fireman stationed at 147th Street and Cicero Avenue; that about 2:50 o'clock p.m. he was driving north on Ashland Avenue and stopped for a red light at 18th Street. When the light turned green he proceeded across 18th Street and when he reached the north end of the safety island on the west side of Ashland Avenue, "a man ran in front of me * * * I got a little behind the safety island and a man ran in front of me and I slapped on my brakes; there was a truck on the other side of me (to the east); the man ran in front; he ran over to the street car; he ran right square into the street car a little past the middle; at the time the street car hadn't quite reached the southbound safety island; it was around 25 feet from the safety island, something like that; it was coming from the north; the man was lying right next to the back end of the street car; I think he was in the street car track; it was on the north end of this safety island."

On cross-examination the witness testified that the person injured passed in front of his truck about 100 feet from the corner and that he came from the east curb; "I thought I was going to hit him; the man was not at the crosswalk; there was no traffic ahead of me; he was pretty close, five or six feet from the front of my truck; I had to slap on my brakes or I would run over him; I was going about ten miles an hour; I saw this man running right into the side of the street car while the street car was moving."

plaintiff was removed to Alexian Brothers Hospital where he remained for a week. Upon leaving the hospital plaintiff remained in bed at home for two weeks and went back to work about May 1st, "just about a month after the accident." During his absence plaintiff's salary was paid by the City of Chicago.

Six witnesses testified in behalf of the defendant. Kenneth Personius, called by the defendant, testified that he was a fireman stationed at 147th Street and Cicero Avenue; that about 7:00 o'clock p.m. he was driving north on Ashland Avenue and stopped for a red light at 18th Street. When the light turned green he proceeded across 18th Street and when he reached the north end of the safety island on the west side of Ashland Avenue, "a man ran in front of me." I got a little behind the safety island and a man ran in front of me and I slipped on my brakes; there was a truck on the other side of me (to the east); the man ran in front; he ran over to the street car; he ran right across into the street car a little past the middle; at the time the street car hadn't quite reached the southbound safety island; it was around 75 feet from the safety island, something like that; it was coming from the north; the man was lying right next to the back end of the street car; I think he was in the street car track; it was on the north end of this safety island."

On cross-examination the witness testified that the person injured passed in front of his truck about 100 feet from the corner and that he came from the east curb; "I thought I was going to hit him; the man was not at the crosswalk; there was no traffic ahead of me; he was pretty close, five or six feet from the front of my truck; I had to slip on my brakes or I would run over him; I was going about the same as now; I saw this man running right into the side of the street car while the street car was moving."

Walter Litawa, called by the defendant, testified that he drove a bakery truck and that on the day of the occurrence at about 2:50 p.m. he was traveling north, east of the car tracks on Ashland Avenue; that there was another truck alongside of him; when he first saw the plaintiff he was crossing Ashland Avenue from the east curb about 150 feet north of 18th Street; and that he walked into the southbound street car. On cross-examination he testified that he stopped with the light at 18th Street; at the time of the accident he was traveling about five or eight miles an hour; that the man crossing the street passed about five feet in front of the witness's truck; after passing in front of the witness's car there was another car "traveling abreast with me; this man was not running or anything, just walking; it was broad daylight; the southbound street car was traveling maybe ten miles or so; he walked right into the street car; when I first saw him my car was on the east side of the safety island on the northwest corner, it was north of 18th Street on the east side of the rails; the accident occurred around the north end of the safety island; other than myself and this truck going north on Ashland Avenue at the time there probably could have been other traffic; his body was laying between the north and southbound tracks right in the center of the tracks; I stayed there about ten minutes."

Frank Berg, called by defendant, testified that he was a lathe operator employed by the Haniff Manufacturing Company for approximately five years; that he was a passenger on the southbound street car, standing on the left side of the motorman; "I saw a guy walk into the side of the street car before we got to the safety island; when I first saw him he was approximately halfway between where the street car track was and the side of the walk on the opposite street; I would say the man was forty or fifty feet south of the street car. I could see all the way down the street as I

Walter Liffew, called by the defendant, testified that he drove a delivery truck and that on the day of the occurrence at about 2:30 p.m. he was traveling north, east of the car tracks on Ashland Avenue; that there was another truck alongside of him; when he first saw the plaintiff he was crossing Ashland Avenue from the east curb about 150 feet north of 18th Street; and that he walked into the southbound street car. On cross-examination he testified that he stopped with the light at 18th Street; at the time of the accident he was traveling about five or eight miles an hour; that the man crossing the street passed about five feet in front of the witness's truck; after passing in front of the witness's car there was another car "traveling abreast with me; this man was not running or anything, just waiting; it was broad daylight; the southbound street car was traveling maybe ten miles or so; he walked right into the street car; when I first saw him my car was on the east side of the safety island on the northwest corner, it was north of 18th Street on the east side of the rails; the accident occurred around the north end of the safety island; other than myself and this truck going north on Ashland Avenue at the time there probably could have been other traffic; his body was laying between the north and southbound tracks right in the center of the tracks; I stayed there about ten minutes."

Frank Berg, called by defendant, testified that he was a lathe operator employed by the Smith Manufacturing Company for approximately five years; that he was a passenger on the southbound street car, standing on the left side of the platform; "I saw a guy walk into the side of the street car before we got to the safety island; when I first saw him he was approximately halfway between where the street car track was and the side of the walk on the opposite street; I would say the man was forty or fifty feet south of the street car. I could see all the way down the street as I

rode on the front platform. Nothing to obstruct my vision. When I saw this man between the east curb and the northbound tracks he was not walking along as an ordinary person walks; he seemed to be either intoxicated or just in a dazed condition at the time; when the motorman clanged the bell he did not pay any attention to the bell at all."

Franklin D. Bergren, called by defendant, testified that he was a foreman of meat provisions with Wilson & Company where he has been employed since 1929; that he was a passenger on a southbound Ashland Avenue car on the afternoon of the day of the occurrence; seated in the second cross seat toward the front on the west side; that when the street car approached 18th Street he heard the clanging of the motorman's bell; that he went to the back of the street car and saw a man lying in the street; he was lying north of the abutment of the southbound safety island crossing in the northbound track; "I didn't see what happened to the man before." On cross-examination he stated he did not know where the man came from; he was reading his newspaper at the time.

Lewis Onixt, called by defendant, testified that he was a police officer in the City of Chicago for the past nine years, and on the day of the occurrence he was cruising in the vicinity of 18th and Ashland where he found a man lying in the street; "the man was lying in the northbound car tracks, about even with the north end of the southbound safety island; we got a wagon to remove him."

Michael Barry, called by defendant, testified that he was a street car conductor for twenty-one years and on the day of the accident just before the southbound Ashland Avenue car reached 18th Street he heard the motorman ring the gong and then the car stopped in the safety island where four or five passengers boarded it; that he saw the motorman go around the northbound track and he in turn

rode on the front platform. Nothing to obstruct my vision. When I saw this man between the east curb and the northbound tracks he was not walking along as an ordinary person would; he seemed to be either intoxicated or just in a dazed condition at the time; when the motorist changed the bell he did not pay any attention to the bell at all."

Franklin S. Bergman, called by defendant, testified that he was a foreman of meat provisions with Wilson & Company where he had been employed since 1929; that he was a passenger on a northbound Ashland Avenue car on the afternoon of the day of the occurrence; seated in the second coach seat toward the front on the west side; that when the street car approached 18th Street he heard the clanging of the motorist's bell; that he went to the back of the street car and saw a man lying in the street; he was lying north of the apartment of the northbound safety island crossing in the northbound track; "I didn't see what happened to the man before." On cross-examination he stated he did not know where the man came from; he was walking the newspaper at the time.

Lewis Galt, called by defendant, testified that he was a police officer in the City of Chicago for the past nine years, and on the day of the occurrence he was standing in the vicinity of 18th and Ashland where he found a man lying in the street; "The man was lying in the northbound car track, about even with the north end of the northbound safety island; we got a wagon to remove him."

Michael Barry, called by defendant, testified that he was a street car conductor for twenty-one years and on the day of the accident just before the northbound Ashland Avenue car reached 18th Street he heard the motorist ring the gong and then the car stopped in the safety island where four or five passengers boarded it; that he saw the motorist go around the northbound track and he in turn

went around the car and saw a man lying face downward about twenty-five feet north of the safety island. Witness did not see the plaintiff immediately before the accident.

Defendant's principal contentions are that the verdict is against the manifest weight of the evidence, and that the damages awarded are excessive.

Plaintiff maintains that a consideration of the case in all its aspects indicates that the verdict has a strong foundation in the evidence. There is an irreconcilable conflict in the testimony. Plaintiff says he was struck at the crosswalk. Morz, testified plaintiff was hurled fifteen or twenty feet by the impact and that the safety island was 18 or 20 feet long, "maybe 22 feet." The chart of the intersection, introduced by defendant without objection, shows the distance between the crosswalk and the north end of the safety island to be more than 100 feet.

That plaintiff was lying at or beyond the north end of the safety island is not disputed.

In his brief plaintiff says that none of defendant's witnesses identified the plaintiff as the man they saw crossing the street and that not one of defendant's witnesses identified Carroll as the man they saw lying in the street after the accident, thus inferring that the person defendant's witnesses saw lying at the north end of the safety island was not the plaintiff. This theory presupposes another accident at the same intersection and at the same time involving some person other than the plaintiff. There is no testimony in the record tending to support such a theory.

Morz testified that immediately after plaintiff was struck, "I went over there to give a hand and they told me not to touch him until the police came * * * I was there when the police arrived which was I imagine fifteen minutes after the accident. I gave my name as a witness to the police." Officer Onixt, called in behalf

went around the car and saw a man lying face downward about twenty-five feet north of the safety island. Witness did not see the plaintiff immediately before the accident.

Defendant's principal contentions are that the verdict is against the manifest weight of the evidence, and that the damages awarded are excessive.

Plaintiff maintains that a consideration of the case in all its aspects indicates that the verdict has a strong foundation in the evidence. There is an irreconcilable conflict in the testimony. Plaintiff says he was struck at the crosswalk, says testified plaintiff was hurt fifteen or twenty feet by the impact and that the safety island was 18 or 20 feet long, "maybe 25 feet." The chart of the intersection, introduced by defendant without objection, shows the distance between the crosswalk and the north end of the safety island to be more than 100 feet. That plaintiff was lying at or beyond the north end of the safety island is not disputed.

In his brief plaintiff says that none of defendant's witnesses identified the plaintiff as the man they saw crossing the street and that not one of defendant's witnesses identified Garoff as the man they saw lying in the street after the accident, thus inferring that the person defendant's witnesses saw lying at the north end of the safety island was not the plaintiff. This theory presupposes another accident at the same intersection and at the same time involving some person other than the plaintiff. There is no testimony in the record tending to support such a theory. More testified that immediately after plaintiff was struck,

"I went over there to give a hand and they told me not to touch him until the police came * * * I was there when the police arrived which was I imagine fifteen minutes after the accident. I gave my name as a witness to the police." Officer Glink, called in behalf

of defendant, testified that he was the first to arrive at the scene of the occurrence and that the man was lying in the northbound tracks about even with the north end of the southbound safety island. His testimony is undisputed, and the record is barren of any evidence showing that Onixt or the other police who arrived later attended any person other than the plaintiff. None of the defendant's witnesses saw a northbound street car in the immediate vicinity at the time of the accident. Personius and Litawa both testified that they heeded the traffic lights at 18th Street and then proceeded slowly north on Ashland Avenue. Neither Personius, who was driving his truck in the northbound street car tracks, nor Litawa, who was driving abreast and to the east of Personius, saw any street car or vehicular traffic in front of them as plaintiff crossed directly in front of both of them. Moreover, Morz's testimony is self-contradictory with respect to where he was standing on the safety island and the point at which plaintiff was struck by the northbound street car. Defendant's witnesses gave consistent versions of the occurrence and so far as the record shows they are disinterested and credible. It is apparent that the jury disregarded their testimony and the physical facts.

We are impelled to hold that a clear preponderance of the evidence supports defendant's contention that the verdict of the jury is against the manifest weight of the evidence.

Since this cause must be retried, we shall rule upon plaintiff's instruction number 5 of which defendant complains. This instruction refers to permanent injuries. There was no proof tending to show that the conditions complained of by plaintiff were permanent in their nature. We think, therefore, that the instruction was defective and should not have been given. In the view which we take of this case it is unnecessary to consider the other points raised.

of defendant, testified that he was the first to arrive at the scene of the occurrence and that the man was lying in the neighborhood of the north end of the neighborhood safety island. His testimony is uncontradicted, and the record is barren of any evidence showing that any of the other police who arrived later attended any person other than the plaintiff. None of the defendant's witnesses saw a neighborhood street car in the immediate vicinity at the time of the accident. Personals and others both testified that they headed the traffic light at 14th Street and then proceeded directly north on Central Avenue. Neither personals, who was driving his truck in the neighborhood street car track, nor defense, who was driving abreast and to the east of defendant, saw any street car or vehicular traffic in front of them as plaintiff crossed directly in front of both of them. Moreover, none's testimony is self-contradictory with respect to when he was standing on the safety island and the point at which plaintiff was struck by the neighborhood street car. Defendant's witnesses and personals in relation of the occurrence are in fact as the record shows that the neighborhood and evidence. It is apparent that the neighborhood safety island and the Central Avenue are labeled to hold that a clear preponderance of the evidence supports defendant's contention that the verdict of the jury is against the plaintiff's right of recovery. Since this court must be satisfied, as shall rule upon plaintiff's instruction number 2 of which defendant complains. This instruction refers to permanent injuries. There was no great tending to show that the conditions complained of by plaintiff were permanent in their nature. We think, therefore, that the instruction was defective and should not have been given. In the view which we take of this case it is unnecessary to consider the other points raised.

For the reasons given, the judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

KILEY AND BURKE, JJ. CONCUR.

For the reasons given, the judgment is reversed and the

cause is remanded for a new trial.

NEW YORK, N.Y., 11. 11. 1911.

KIRBY AND KIRBY, J.J. CONNOR.

44055

MORT SCHAFFNER,

Appellant,

v.

MAURICE L. COWEN,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

3321.A. 135²⁵¹

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Mort Schaffner filed a statement of claim for possession of the first floor apartment at 6150 North Hamilton Avenue, Chicago, which he alleges Maurice L. Cowen unlawfully withholds. A trial without a jury resulted in a finding and judgment against the plaintiff, who appeals.

Defendant went into possession under a lease from Perry Johnson dated May 14, 1945, for a term commencing June 1, 1945 and ending May 31, 1946. The building contains three apartments. On June 27, 1945 Johnson conveyed to Mort Schaffner and Stuart A. Goldman. The latter moved into the second apartment. Schaffner, desiring to occupy the first apartment, the Rent Director, on September 10, 1946, issued a certificate authorizing him to pursue his remedies under local law.

In a letter of April 11, 1946, Johnson notified defendant that when the lease expired on May 31, 1946, no renewal or extension would be given and that if he wished to remain on a month to month basis, he might do so. On September 28, 1946 plaintiff served defendant with a written notice of the termination of the tenancy, and a demand for possession at the close of October 31, 1946. Defendant's refusal to comply was followed by the filing of the instant suit.

MORT SCHAFER

Appellant

v.

MAURICE L. COOK

Defendant

SHAFER, MORT

COOK, MAURICE L.

{

ALLIANCE

A

122

MR. JUSTICE

Mort Schaffer filed a statement of claim for possession of the first floor apartment at 6150 Avenue Hamilton, Ontario, which he alleges Maurice L. Cook occupies. The trial without a jury resulted in finding and judgment against the plaintiff, who appeals.

Defendant went into possession under a lease from Cook Johnson dated May 14, 1945, for a term of one year, and ending May 31, 1946. The building contains three apartments. On June 27, 1945 Johnson conveyed to Cook and thereon Goldstein. The latter moved into the second apartment. Cook desiring to occupy the first apartment, on or about August 10, 1945, issued a certificate authorizing him to remove his residence under local law.

In a letter of April 11, 1946, Johnson notified defendant that when the lease expired on May 31, 1946, no renewal or extension would be given and that it was wished to remain on a month to month basis, he might do so. On September 28, 1945 plaintiff served defendant with a written notice of the termination of the tenancy, and a demand for possession at the close of October 31, 1945. Defendant's refusal to comply was followed by the filing of the instant suit.

Defendant a lawyer, testified that on the day he received Johnson's letter of April 11, 1946, he wrote him advising that he did not consider it a sufficient notice; that on or about June 12, 1946, in a telephone conversation between Johnson and defendant, the latter stated that he had not heard from Johnson concerning his (defendant's) letter; that Johnson stated that he was trying to sell the building; that as far as he was concerned he did not want defendant "out of the premises"; that defendant said that he wanted Johnson to know that he considered he had a lease for another year; that Johnson replied: "Well, I agree with you. Don't worry about it. Be happy in your home. You've got a lease for another year. You can ignore that notice I sent you." Johnson denied any such conversation. Defendant paid the rent to Johnson for June, July and August, 1946, and to plaintiff for September and October, 1946.

Plaintiff maintains that the trial judge erred because "he was biased in favor of tenants, relied solely on the testimony of the defendant and gave no credence to the testimony of the plaintiff and the witnesses for the plaintiff." In announcing his finding, the trial judge discussed the testimony. He said that a lawyer "ought not to even be sworn as a witness," and that "his being an officer of my court is sufficient to support any statements that he makes to me." We construe these remarks to mean that he was satisfied that the defendant was telling the truth. The judge was commenting on the credibility of the witnesses. Where there is a conflict in the testimony we will not interfere with the finding of the trial judge, unless it is clearly and manifestly against the weight of the evidence. The case presented a factual question. The record does not show that the trial judge was biased. The finding and judgment is not against the manifest weight of the evidence. Therefore, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR.

JUDGMENT AFFIRMED.

LEWIS, P. J. AND KILLY, J. CONCUR.

Chicago is affirmed.

Therefore, the judgment of the Municipal Court of

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find and the witnesses for the plaintiff." In announcing the

the defendant and have no evidence as the testimony of the plain-

was biased in favor of counsel, relied solely on the testimony of

plaintiff maintaining that the trial judge had become "the

and October, 1945.

for June, July and August, 1945, and to plaintiff for September

denied any such conversation. Defendant said the part to Johnson

for another year. You can ignore that notice I sent you." Johnson

Don't worry about it. Be happy in your home. You've got a house

another year; that Johnson replied: "Well, I agree with you.

wanted Johnson to know that he considered me his best friend for

went defendant "out of the premises; that defendant said that he

to sell the building; that as far as he was concerned he did not

his (defendant's) letter; that Johnson stated that he was trying

the latter stated that he had not heard from Johnson concerning

1945, in a telephone conversation between Johnson and defendant,

did not consider it a sufficient notice; that on or about June 12,

Johnson's letter of April 11, 1945, he wrote him advising that he

Defendant a lawyer, testified that on the day he received

44063

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff - Appellee,

v.

GOLD STAR LINE,

Defendant - Appellant.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT

COOK COUNTY.

332 I.A. 136

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On December 3, 1946 the People of the State of Illinois, by George F. Barrett, Attorney General, filed a petition in the Circuit Court of Cook County for an injunction against Gold Star Line, a corporation, under the provisions of Section 75 of the Illinois Public Utilities Act. The petition represented that the defendant is engaged in the business of transporting passengers for hire and is a public utility within the meaning of an act entitled "An Act concerning public utilities," approved June 29, 1921, as amended; that it operates as a motor carrier for the transportation of passengers and baggage; and that on January 17, 1946 the Illinois Commerce Commission, in a proceeding then pending before it entitled "In the matter of the complaint of South Suburban Safeway Lines, Inc., against Gold Star Line as to illegal carrying of passengers between certain points in Chicago Heights and in Chicago, Illinois," entered an order, the concluding part of which directed the defendant to cease and desist:

"1. From transporting passengers for hire between the intersection of State and Main Streets or any other point in Dolton, Illinois, and the intersection of Illinois and Halsted Streets in Chicago Heights, Illinois, in either direction, where the points of origin and destination lie at or between said points; and

2. From transporting passengers for hire between the 211th Street Station of the Illinois Central Railroad Company and any point in the city of Chicago Heights, Illinois, in either direction, where the points of origin and departure lie at or between said last mentioned points; and

3. From transporting passengers for hire in either direction between any other points lying intermediate between Dolton, Illinois, and the intersection of 211th Street and Kedzie Avenue."

PEOPLE OF THE STATE OF ILLINOIS,
 Plaintiff - Appellee,
 v.
 GOLD STAR LINE,
 Defendant - Appellant.

IN SENATE
 JANUARY 19, 1932

AT THE CITY OF CHICAGO, ILLINOIS, IN SENATE

On December 5, 1930 the People of the State of Illinois, by George F. Barrett, Attorney General, filed a petition in the Circuit Court of Cook County for an injunction against Gold Star Line, a corporation, under the provision of section 73 of the Illinois Public Utilities Act. The petition requested that the defendant be enjoined in the business of transporting passengers for hire and in the public utility within the limits of Cook County, Illinois, and in Chicago, Illinois, "entitled 'An Act concerning public utilities,' approved June 28, 1921, as amended; that it operate as a motor carrier for the transportation of passengers and baggage; and that on January 15, 1932 the Illinois Commerce Commission, in a proceeding then pending before it entitled 'In the matter of the consolidation of Gold Star Line and Chicago and North Western Railway Lines, Inc.,' assign Gold Star Line as to Illinois carrying of passengers between certain points in Chicago Heights and in Chicago, Illinois," entered an order, the concluding part of which directed the defendant to cease and desist:

1. "From transporting passengers for hire between the intersection of State and Main Streets or any other point in Boston, Illinois, and the intersection of Illinois and Halsted Streets in Chicago Heights, Illinois, in either direction, where the points of origin and destination lie at or between said points; and
2. From transporting passengers for hire between the Fifth Street Station of the Illinois Central Railroad Company and any point in the city of Chicago Heights, Illinois, in either direction, where the points of origin and destination lie at or between said last mentioned points; and
3. From transporting passengers for hire in either direction between any other points lying intermediate between Boston, Illinois, and the intersection of Illinois and Halsted Avenue."

The petition further stated that on or about January 22, 1946 the Commission caused a copy of the order to be served on the defendant; that the latter appealed to the Circuit Court of Cook County; that on or about June 20, 1946 that court affirmed the order; that notwithstanding the directions of the order, the defendant "in disobedience and defiance of the said order" continued to transport passengers for hire between the intersection of State and Main Streets in Dolton, Illinois, and the intersection of Illinois and Halsted Streets in Chicago Heights, Illinois, and also between other points in Dolton, Illinois and the intersection of Illinois and Halsted Streets in Chicago Heights, Illinois, and also between other points lying at or between Dolton, Illinois, and the intersection of Illinois and Halsted Streets in Chicago Heights, Illinois; and also continues to transport passengers for hire between the 211th Street Station of the Illinois Central Railroad Company and various points in Chicago Heights, Illinois, and also between other points lying intermediate thereto; and also continues to transport passengers for hire between various other points lying intermediate between Dolton, Illinois and the 211th Street Station of the Illinois Central Railroad Company. The People asked that the court grant a temporary injunction restraining and prohibiting the defendant from doing what was prohibited in the "cease and desist" order, and that upon final hearing of the cause, the injunction be made permanent. The petition was verified by the vice president of the South Suburban Safeway Lines.

A motion by defendant to strike and dismiss the petition was denied. Defendant, answering, states that the petition is wholly insufficient in that it fails to comply with the provisions of Section 75 of the Illinois Public Utilities Act; admits that the Commission entered the "cease and desist" order; that the order was affirmed by the Circuit Court; shows that an appeal "is now pending in the Supreme Court" to reverse or modify the order; and denies

The petition further stated that on or about January 28, 1945 the Commission caused a copy of the order to be served on the defendant; that the latter appeared in the Circuit Court of Cook County; that on or about June 20, 1945 that court affirmed the order; that notwithstanding the affirmance of the order, the defendant "in disobedience and defiance of the said order" continued to transport passengers for hire between the intersection of State and Main Streets in Chicago, Illinois, and the intersection of Illinois and Halsted Streets in Chicago, Illinois, and also between other points in Chicago, Illinois, and the intersection of Illinois and Halsted Streets in Chicago, Illinois, and also between other points lying at or between Chicago, Illinois, and the intersection of Illinois and Halsted Streets in Chicago, Illinois; and also continues to transport passengers for hire between the Fifth Street Station of the Illinois Central Railroad Company and various points in Chicago, Illinois, and also between other points lying immediately adjacent; and also continues to transport passengers for hire between various other points lying intermediate between Chicago, Illinois and the Fifth Street Station of the Illinois Central Railroad Company. The people asked that the court grant a temporary injunction restraining and prohibiting the defendant from doing what was prohibited in the "cease and desist" order, and that upon final hearing of the cause, the injunction be made permanent. The petition was verified by the vice president of the South Suburban Railway Lines.

A motion by defendant to strike and dismiss the petition was denied. Defendant, answering, stated that the petition is wholly insufficient in that it fails to comply with the provisions of Section 75 of the Illinois Public Utilities Act; admits that the Commission entered the "cease and desist" order; that the order was affirmed by the Circuit Court; shows that an appeal is now pending in the Supreme Court; to reverse or modify the order; and denies

that it is carrying passengers or baggage in defiance and disobedience of the order. On January 13, 1947, on motion of the Attorney General, the Circuit Court found that on January 17, 1946 the Commerce Commission entered the order hereinbefore mentioned and decreed that until the further order of the court the defendant, its agents and servants, be enjoined from doing the things prohibited in the order entered by the Commerce Commission. Defendant appeals from this interlocutory decree.

We have read the briefs and abstract filed in the case of South Suburban Safeway Lines vs. Gold Star Line, No. 29859, in the Supreme Court of Illinois, and also the opinion filed therein at the May, 1947 term. Our Supreme Court found that the cease and desist order of the Commission was a nullity and that the judgment of the Circuit Court of Cook County affirming the same must be reversed. It reversed the judgment of the Circuit Court and set aside the order of the Commission. The Supreme Court said:

"The line that divides judicial questions from determinations which may be made by an administrative body is well established. Without exploring the possibilities that might be developed by an examination of such question, we conclude that the Commerce Commission did not have the power or authority to enter the cease-and-desist order on which this appeal is based. Section 75 of the Public Utilities Act (Ill. Rev. Stat. 1945, chap. 111-2/3, par. 79,) provides that whenever the commission is of the opinion that any public utility is failing or omitting, or is about to fail or omit, to do anything required of it by law, or by any order, decision, rule, regulation, direction or requirement of the commission, issued or made under the authority of the act, or is doing anything or about to do anything contrary to or in violation of law or any order, decision, rule, regulation or requirement of the commission issued or made under the authority of the act, the commission shall, in any such case, commence an action or proceeding in a court of record in the name of the People for the purpose of having such violation or threatened violation stopped and prevented either by mandamus or injunction. The statute directs that the final judgment entered in such an action shall either dismiss the proceeding or direct that the writ of mandamus or injunction issue and that it be made permanent as prayed for in the petition or in such modified form as will afford appropriate relief."

The Supreme Court points out the provisions of Section 75 of the Public Utilities Act, whereby an action may be commenced for the purpose of having a violation or threatened violation stopped and prevented either by mandamus or injunction. In such an action

the People would be required to make a proper showing to warrant the relief prayed. In the instant case the temporary injunction was sought and granted solely on the basis of the cease and desist order. A reading of the transcript of the hearing in the case at bar shows that the attorney for the defendant argued that the People were not entitled to an injunction "simply because the Commerce Commission entered an order." The chancellor took the position that a preliminary injunction should issue solely on the basis of the order issued by the Commerce Commission. This is indicated by the following statements by him: "The question is whether or not an order was entered by the Commerce Commission. * * * Now, if the Commerce Commission entered such an order, the only other questions involved must be whether they had the jurisdiction to enter the order. * * * I think the Commerce Commission is entitled to have an injunction against you from violating the order that was admittedly entered. * * * We are entering the injunctive order simply on the ground that the order in question was made by the Commerce Commission. I am not saying, and I cannot say, that there has been any violation, and would not punish for any violation committed before this date. ***"

As the Supreme Court has decided that the order of the Commerce Commission, which was the sole ground for the granting of the temporary injunction, was a nullity, there is no support for the temporary injunction. Therefore, the decree of the Circuit Court of Cook County granting the temporary injunction, is reversed.

DECREE REVERSED.

LEWE, P.J. AND KILEY, J. CONCUR.

43918

JOHN SEXTON, doing business as
JOHN SEXTON & CO.,

Plaintiff - Appellee,

v.

COMMONWEALTH EDISON COMPANY, an
Illinois Corporation,

Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

332 I.A. 136²

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover on an alleged oral contract. Verdict and judgment for \$5,000 were in plaintiff's favor and defendant has appealed.

Plaintiff in March 1939, was a grading contractor and defendant a public utility in Chicago, Illinois. It can be fairly said that the record in this case shows that defendant owned the vacant property, certain rights in which underlie this law suit. The property involved is in Chicago and is bounded on the south by railroad tracks, on the north by Addison Avenue, on the northeast by Elston Avenue, on the east by Kedzie Avenue and on the west by a north-south line 400 feet east of Kimball Avenue.

Plaintiff alleged that on March 27, 1939, he was in lawful possession of the right of grading the property; that under that right he made the contract with defendant giving it the privilege of dumping on the property at 10 cents per cubic yard, and that the defendant dumped over 50,000 cubic yards pursuant to the agreement for which it refused to pay, thereby becoming indebted to him for more than \$5,000.

Defendant answered denying plaintiff's possession, of the right to fill and grade the property; alleging that on the 27th of March 1939, it owned and possessed the property, and it denied

JOHN SEXTON, doing business as
JOHN SEXTON & CO.,

Plaintiff - Respondent,

v.

ILLINOIS CORPORATION,
Defendant - Respondent.

This is an action for recovery of damages and
costs and judgment for interest and
attorneys' fees.

Plaintiff in this case, John Sexton & Co.,
a corporation organized under the laws of Illinois,
sued the defendant, Illinois Corporation, a
corporation organized under the laws of Illinois,
for damages and costs and judgment for interest
and attorneys' fees. The property involved is in
Chicago, Illinois, and is situated on the south
west corner of the intersection of the
North-South Line and the West-South Line.

Plaintiff alleges that on or about March 19, 1933,
it was wrongfully and unlawfully deprived of
possession of the right of use and enjoyment of
the property involved in this case, and that
defendant wrongfully and unlawfully retained
possession of the property involved in this case,
and that defendant is liable to plaintiff for
damages and costs and judgment for interest
and attorneys' fees.

Plaintiff denies that it was wrongfully and
unlawfully deprived of possession of the property
involved in this case, and that defendant is
liable to plaintiff for damages and costs and
judgment for interest and attorneys' fees.

the agreement and the debt. Plaintiff filed no reply. Plaintiff's proof shows that several days prior to March 27, 1939, he made a written agreement with one Kelleher, under which he was to pay \$1,000 for the right to fill and grade the property; that he paid \$200 on account; that on March 27, 1939 he made the oral agreement with defendant's employee Zeeb, whose duties included obtaining dumping places; that the following day defendant commenced dumping; that on April 3, 1939, plaintiff's equipment was ordered, and excluded, from the property; and that defendant continued to dump on the property for two years to the extent of about 50,000 cubic yards.

Plaintiff concedes that he had the burden of proving his ownership of the right to dump in the property. For prima facie proof of this element he says there is testimony that the property was under lease to Kelleher who was in possession at the time of the oral agreement; that Kelleher received bids for the grading; and that he and plaintiff made a written agreement under which plaintiff acquired the dumping right. He refers us to the statement by defendant's counsel in arguing an objection at the trial where reference was had to the Kelleher lease; to testimony of McKenzie, defendant's superintendent and superior of Zeeb, that McKenzie in March 1939, knew that Kelleher had a lease and that he sent engineers to the property in the latter part of March 1939 to place stakes in the property as a guide to the level of dumping and grading; to plaintiff's testimony that the stakes were placed on March 31st, after the oral agreement, and that plaintiff continued to supervise the dumping therein until April 4th; and to a statement of McKenzie's to plaintiff that defendant's real estate department "did not know what they were doing" when it made the lease. There is testimony that, although defendant had not dumped into the property for some time, it commenced dumping the day after the alleged oral agreement. There is also

the agreement and the debt. Plaintiff filed no reply. Plaintiff's proof shows that several days prior to March 27, 1932, he made a written agreement with one Kellisher, under which he was to pay \$1,000 for the right to fill and grade the property; that he paid \$200 on account; that on March 27, 1932 he made the oral agreement with defendant's employee Reeb, whose duties included obtaining dumping places; that the following day defendant commenced dumping; that on April 5, 1932, plaintiff's equipment was ordered, and excluded, from the property; and that defendant continued to dump on the property for two years to the extent of about 50,000 cubic yards. Plaintiff concedes that he had the burden of proving his ownership of the right to dump in the property. For this purpose proof of this element he says there is testimony that the property was under lease to Kellisher who was in possession at the time of the oral agreement; that Kellisher received bids for the grading; and that he and plaintiff made a written agreement under which plaintiff acquired the dumping right. He refers us to the statement by defendant's counsel in arguing an objection at the trial where reference was had to the Kellisher lease; to testimony of McKenzie, defendant's superintendent and operator of Reeb, that Reeb in March 1932, knew that Kellisher had a lease and that he sent engineers to the property in the latter part of March 1932 to place stakes in the property as a guide to the level of dumping and grading; to plaintiff's testimony that the stakes were placed on March 21st, after the oral agreement, and that plaintiff continued to supervise the dumping therein until April 4th; and to a statement of McKenzie to plaintiff that defendant's real estate department "did not know what they were doing" when it made the lease. There is testimony that, although defendant had not dumped into the property for some time, it commenced dumping the day after the alleged oral agreement. There is also

testimony that in March when McKenzie visited the premises, Kelleher was putting up electric standards and "getting organized for the operation of a golf school."

Defendant offered no testimony. It rested its case after plaintiff rested his. It contends that plaintiff, by not replying, admitted the allegation in defendant's answer that on March 27, 1939, it was in possession of the premises. The record does not disclose that defendant claimed benefit of this admission at the trial. Furthermore, no objection is made to the testimony which tended to show that during March Kelleher was in possession making preparations for the opening of a golf course.

Defendant contends, moreover, that plaintiff has failed to prove that he owned the right of dumping on the property. We have covered hereinabove the testimony upon which plaintiff relies to make this proof. Assuming that there is prima facie evidence of a lease between defendant and Kelleher, there is no evidence which tends to prove that the lease conferred upon Kelleher the right to dump upon the property. There is no evidence from which a legal inference may be made of the existence of such a provision. The agreement between plaintiff and Kelleher and the formal lease offered by plaintiff were excluded from evidence. No cross error is assigned upon the court's ruling. In the statement by defendant's counsel, to which plaintiff refers us, the term of the lease is said to commence May 1, 1939. Even if properly in the record before us for our consideration, a lease between defendant and Kelleher commencing May 1, 1939, would confer no rights prior to that date which Kelleher could have contracted away to plaintiff. We are compelled to conclude that defendant's contention is sound. We hold, therefore, as a matter of law that plaintiff has failed to make out a case.

For the reasons given the judgment is reversed.

JUDGMENT REVERSED.

LEWE, P.J. AND BURKE, J. CONCUR.

testimony that in 1939, when the first trial was held, the evidence was sufficient to establish the guilt of the defendant.

It is also a fact that

the defendant was not present at the trial.

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43945

IN THE MATTER OF THE ESTATE OF
CHARLES F. ISAACS, Deceased,

LOUIS N. ISAACS, EDITH FLOOD,
ELIZABETH GERRY, CLARE DONOHUE,
MARGUERITE PRIVAT, WILL J. ISAACS,
MARIE CARNS, ED. V. ISAACS,

Petitioners - Appellees,

v.

METROPOLITAN TRUST COMPANY,

Respondent - Appellant.

332 I.A. 137

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

254

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This proceeding originated in the Probate Court and was designed to recover, from the decedent's estate, property of the petitioners. The prayer of the petition was denied in the Probate Court and an appeal was taken to the Circuit Court where the matter was retried and a decree entered, in favor of the petitioner, from which the successor administrator has appealed.

The petitioners are three brothers and five sisters of the decedent Charles Isaacs. Mathilda Isaacs was their mother. She died in 1928. At the time of her death she was the owner of real and personal property. Included in the personal property owned by her were two stock certificates No. CO-94106 for 25 shares of Armour & Co. preferred, and No. CO-3436 for 20 shares of E.J. BRACH & SONS common stock. These certificates had been issued in her name before her death. Another certificate No. CO-103379 for 7 shares of Armour & Co. preferred, likewise issued in her name before her death, but had been purchased with the money of her daughter Marguerite Privat.

IN THE MATTER OF THE ESTATE OF
CHARLES F. LARSON, Deceased.

LOUIS W. LARSON, with power,
WILLIAM L. LARSON, with power,
MARGUERITE LARSON, with power,
MARIE LARSON, et al.,
Plaintiffs - Appellants,

v.

METROPOLITAN TRUST COMPANY,
Respondent - Appellee.

MR. JUSTICE HILLY delivered the opinion of the court. This proceeding originated in the Probate Court and was designed to recover from the decedent's estate, property of the petitioners. The prayer of the petition was denied in the Probate Court and an appeal was taken to the Circuit Court where the matter was retried and a decree entered, in favor of the petitioners, from which the respondent administrator has appealed. The petitioners are three brothers and five sisters of the decedent Charles Larson. Nathalia Larson was their mother. She died in 1938. At the time of her death she was the owner of real and personal property. Included in the personal property owned by her were two stock certificates No. 00-24103 for 20 shares of stock in the preferred, and No. 00-24104 for 20 shares of common stock. These certificates had been issued in her name before her death. Another certificate No. 00-10372 for 7 shares of stock in the preferred, likewise issued in her name before her death, but had been purchased with the money of her daughter Marguerite Larnson.

Charles Isaacs, decedent, died in October 1943, leaving as his only heir Marguerite Isaacs Bender, an adopted daughter. She served as administratrix of his estate until October 1945, when she became a non-resident and was succeeded by the respondent Trust Company. An inventory filed in the Charles Isaacs' estate listed, among other things, three stock certificates, one covering 25 shares of Armour & Co. preferred stock, one covering 50 shares of Armour common stock and one covering 20 shares of E. J. Brach & Sons common stock. These certificates were issued in the name of decedent, in lieu of the certificates which bore the name of Mathilda Isaacs at her death.

The petition alleges that after Mathilda Isaacs died, the nine children agreed that the decedent Charles Isaacs should hold and manage, until its sale and distribution, both the real and personal property of their mother; that pursuant to the agreement, the certificates bearing Mathilda Isaacs name, including that purchased with the funds of Mrs. Privat, were transferred to decedent; that when the certificates of stock were transferred they were unendorsed; that thereafter decedent, without knowledge of or authority from his brothers and sisters, caused the cancellation of the original certificates and the reissuance to him of the certificates listed in the inventory of his estate; that during his lifetime, after the transfer of the stock certificates to him, he collected whatever dividends were paid thereon and appropriated the money to his own use except that collected from the stock bought with the funds of Mrs. Privat and that these, until decedent's death, were disbursed to Mrs. Privat; and that the certificates listed as assets of his estate were not his property but are the joint property of decedent and the petitioners. The petition prayed an assignment of the interest of the petitioners in the certificates and the dividends.

Charles L. Leland, deceased, died in October 1945, leaving

as his only heir his daughter, Leland Leland, an adopted daughter.

She served as administratrix of his estate until October 1946,

when she became a non-resident and was succeeded by the respondent

Trust Company. An inventory filed in the probate court, relative

listed, among other things, certain real estate, and also of

25 shares of common stock, and a certain amount of cash.

of about common stock and one share of 100 shares

of some common stock. These certificates were listed in the name

of deceased, in lieu of the certificates which were in the name of

Charles L. Leland at his death.

The petition alleged that the respondent had

the nine children of deceased, and deceased had five children.

hold and manage, until the death of deceased, and the said

and personal property of their estate, and the respondent to the petition

said, the certificate for the said common stock, and the said

that deceased died in the year 1945, and the respondent

to deceased; that when the certificates of stock were transferred

they were transferred; that the respondent, without knowledge

of or authority from his mother and father, caused the transfer

tion of the original certificates and the respondent to his

the certificates listed in the inventory of the estate; and

during his lifetime, after the transfer of the stock certificates

to him, he collected all the dividends which were paid thereon and

appropriated the money to his own use except that collected from

the stock bought with the funds of Mrs. Leland and that case,

until deceased's death, were distributed to Mrs. Leland; and that

the certificates listed as assets of his estate were not his

property but are the joint property of deceased and the petitioners.

The petition prayed an assignment of the interest of the petitioners

in the certificates and the dividends.

The answer denied the material allegations of the petition, except as to the ownership of the certificates of 7 shares of stock which was admitted to be owned by Mrs. Privat. It averred that the other certificates were owned by the decedent and that during his lifetime none of the petitioners made any claim with respect either to the shares of stock or the dividends. It contained an averment of an affirmative defense which we shall discuss later herein. Defendant introduced no testimony at the trial. At the close of petitioners' case defendant made a motion for a finding in favor of the estate on failure of proof and upon its pleas of statutes of limitations and frauds, the court overruled the motion and entered the decree appealed from. The decree found in favor of the petitioners and granted the relief prayed.

We deem it unnecessary to discuss the several contentions with respect to trusts. Suffice to say the petition did not allege the elements of an express trust, [Marble v. Marble, 304 Ill. 229], nor did it pray for a finding that one had been established. The court did not find that one had been established by the proof. The petition^{ers} alleged that the stock and dividends were their property as well as decedent's and prayed for its return. The decree found the property was not that of decedent's as claimed in the answer, but was held by him for plaintiffs and himself. It ordered the assignment of the stock according to the interests of the parties as determined in the decree. We think that the finding in the decree followed the pleadings and that the question of an express trust was not involved. The colloquy between court and counsel, to which we are referred, does not indicate that plaintiff's position was that there was an express trust. We need not consider, therefore, defendant's contention that plaintiff has changed theories in this court.

The answer denied the material allegations of the petition except as to the ownership of the certificates of 7 shares of stock which was admitted to be owned by Mrs. River. It averred that the other certificates were owned by the decedent and that during his lifetime none of the petitioners made any claim with respect either to the shares of stock or the dividends. It contained an avowment of an affirmative defense which we shall discuss later herein. Defendant introduced no testimony at the trial. At the close of the petitioners' case defendant made a motion for a finding in favor of the estate on failure of proof and upon the issue of statutes of limitations and laches, the court overruled the motion and entered the decree appealed from. The decree found in favor of the petitioners and granted the relief prayed.

We deem it unnecessary to discuss the several conclusions with respect to trusts. Suffice to say the petition did not allege the elements of an express trust, Martin v. Martin, 204 Ill. 232, nor did it pray for a finding that one had been established. The court did not find that one had been established by the proof. The petition alleged that the stock and dividends were their property as well as decedent's and prayed for its return. The decree found the property was not that of decedent's as claimed in the answer, but was held by him for plaintiff and herself. It ordered the assignment of the stock according to the interests of the parties as determined in the decree. We think that the finding in the decree followed the pleadings and that the question of an express trust was not involved. The colloquy between court and counsel, to which we are referred, does not indicate that plaintiff's position was that there was an express trust. We need not consider, therefore, defendant's contention that plaintiff has changed theories in this court.

The petitioners were not qualified to testify at the trial. Louis Privat, husband of one of the petitioners, was offered as a witness to support the petition. Objection was made that since his wife was disqualified under Section II of the Evidence Act, so was he. The court overruled the objection on the theory that the amendment of 1935 to Section V of the Evidence Act had removed the disqualification. This was error. Heineman v. Hermann, 385 Ill. 191; Peters v. Peters, 376 Ill. 237; Treleaven v. Dixon, 119 Ill. 548. The witness was not competent.

Objection was made to the testimony of Attorney Michels, a witness for plaintiff. Objection was made on the ground that the witness had represented decedent in his lifetime. The court overruled the objection. In the preliminary examination of the witness to test his competency, it appeared that he had drawn up a will for the decedent in February 1929; that he had not represented the decedent since that time; that he had represented two of the petitioners on occasions within the last 20 years and that, although he had prepared the instant petition for presentation in the Probate Court, he withdrew as attorney before the proceeding commenced when he learned it was to be contested and that he had not participated in the proceedings since, had not been paid and did not expect to be paid. Under these circumstances the witness did not come within the rule laid down in McKey v. McKean, 384 Ill. 112, cited by defendant. We think the court properly ruled on the competency of this witness. Spencer v. Wilsey, 330 Ill. App. 439.

Attorney Michels testified to conversation in 1929, 1938 and 1939 with decedent, in which the latter stated that he held the stock and dividends for his brothers and sisters and himself, and that he was to sell it when the price was right, distribute the proceeds and the income. He further testified that decedent said

The witnesses were not called to testify at the trial.
Louis Trivett, husband of one of the petitioners, was called as
a witness to support the petition. Objection was made that since
his wife was disqualified under section 1 of the Evidence Act,
so was he. The court overruled the objection on the ground
that the amendment of 1928 to section 1 of the Evidence Act had
removed the disqualification. This was error. Wainman v. Wainman
389 Ill. 181; Wainman v. Wainman, 375 Ill. 577; Wainman v. Wainman
319 Ill. 543. The witness was not competent.
Objection was made to the competency of another witness,
a witness for the defendant. Objection was made that the court
the witness had represented himself in his testimony. The court
overruled the objection. In the opinion of the majority of the
witness to test his competency, it was held that he was competent
a bill for the recovery in equity of the property of the deceased
the deceased since that time; that he was not disqualified from being
petitioners on occasions within the last 10 years and that, although
he had prepared the petition within the period in the previous
court, he withdrew the petition before the proceeding was heard
when he learned it was to be contested and that he was not disquali-
fied in the proceedings since, had not been called and did not
expect to be called. Other facts of substance the court did not
come within the rule laid down in Wainman v. Wainman, 375 Ill. 577,
cited by defendant. We think the court properly ruled on the
competency of this witness. Wainman v. Wainman, 375 Ill. 577, 580.
Attorney Nichols testified to conversation in 1928, 1929
and 1930 with decedent, in which the latter stated that he held
the stock and dividends for his brothers and sisters and himself,
and that he was to sell it when the price was right, distribute the
proceeds and the income. He further testified that decedent said

he had paid the dividends to Mrs. Privat on her 7 shares of stock. Another witness testified that she had conversations with the decedent in 1935 and twice in 1940, to substantially the same effect. One of the petitioners testified to a conversation with Mrs. Henderson, after the death of the decedent, in which Mrs. Henderson said that she was going to make arrangements to turn over the stock. A letter was introduced in evidence written by Mrs. Henderson after she became administratrix which indicated that she intended to return to Chicago to distribute the stock. We think this testimony was sufficient to meet the claimed admission, through plaintiff's failure to reply, that each child of Mathilda Isaac's received in full all that each was entitled to from the assets of her estate. Defendant did not object to the testimony on the ground of the admission. The introduction of the testimony accordingly waived the filing of the reply.

We think the foregoing testimony warranted the finding of the trial court that the stock and dividends were the property of the decedent and the petitioners and did not belong solely to the decedent. The court needed to go no further. We conclude, that the decree was proper and it is affirmed.

AFFIRMED.

LEWIS, P.J. AND MURKIN, J. CONCUR.

Dec 24

51

The following information was obtained from the records of the
 Bureau of the Census, Department of Commerce, for the year 1954:
 The total number of persons in the United States who were
 employed in the manufacturing industry was 14,100,000.
 The total number of persons in the United States who were
 employed in the service industry was 11,500,000.
 The total number of persons in the United States who were
 employed in the agricultural industry was 3,500,000.
 The total number of persons in the United States who were
 employed in the government industry was 1,500,000.
 The total number of persons in the United States who were
 employed in the transportation industry was 1,000,000.
 The total number of persons in the United States who were
 employed in the health industry was 500,000.
 The total number of persons in the United States who were
 employed in the education industry was 500,000.
 The total number of persons in the United States who were
 employed in the leisure industry was 500,000.
 The total number of persons in the United States who were
 employed in the other industry was 500,000.

1955-1956

[Faint handwritten notes at the bottom of the page]

he had paid the dividends to Mrs. Privat on her 7 shares of stock. Another witness testified that she had conversations with the decedent in 1935 and twice in 1940, to substantially the same effect. One of the petitioners testified to a conversation with Mrs. Henderson, after the death of the decedent, in which Mrs. Henderson said that she was going to make arrangements to turn over the stock. A letter was introduced in evidence written by Mrs. Henderson after she became administratrix which indicated that she intended to return to Chicago to distribute the stock.

part of the
fact
is → We think that the foregoing testimony warranted the finding of the trial court that the stock and dividends were the property of the decedent and the petitioners and did not belong solely to the decedent. The court needed to go no further. We conclude, that the decree was proper and it is affirmed.

AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

he had paid the dividends to Mrs. Trivet on her 7 shares of stock. Another witness testified that she had conversations with the decedent in 1935 and twice in 1940, to substantially the same effect. One of the petitioners testified to a conversation with Mrs. Henderson, after the death of the decedent, in which Mrs. Henderson said that she was going to make arrangements to turn over the stock. A letter was introduced in evidence written by Mrs. Henderson after the decedent's death which indicated that she intended to return to Oregon to distribute the stock. We think that the foregoing testimony warranted an finding of the trial court that the stock and dividends were the property of the decedent and the petitioners and do not belong solely to the decedent. The court needed to be so instructed, in conclusion, that the decedent was proper and it is affirmed.

affirmed.

LEWIS, J. J. and WILLIAMS, J. J.

43979

332 I.A. 138

JOHN SYDOR,

Appellee,

v.

RENA BERGER, doing business as
GAGE LIQUOR STORE,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

255

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action originally commenced against the owner of the premises, and lessee of part thereof, upon which plaintiff was injured. Before trial the suit was dismissed as to Mrs. Warpack, owner, upon payment to plaintiff of \$2,500. The trial proceeded against the tenant Rena Berger and resulted in a verdict and judgment in favor of plaintiff for \$2,500. Defendant has appealed.

Plaintiff suffered his injuries about 7:30 P.M. July 29, 1942. He fell in a hallway of the premises owned by Mr. and Mrs. Warpack at the southwest corner of 55th Street and California Avenue in Chicago. The premises consist of a one story building, divided into a bakery, in the corner store; a restaurant operated by the Warpacks on the California Avenue side, south of the bakery; and a liquor store operated by Rena Berger west of the bakery on 55th Street. The hallway runs from the south rear of the premises north to the liquor store. About four weeks before the plaintiff was injured, a piece of metal was placed at the base of the south exit of the hallway near a door leading into the restaurant. Plaintiff tripped upon this metal and fell, breaking both bones in his right leg.

Defendant contends that the hallway was common to all the tenants, was not controlled by her and that she was not liable, therefore, for injuries from defects arising out of wrongful maintenance. Plaintiff to support the judgment on this point says that

defendant adopted the hallway as a means of passage and was an invitor of plaintiff, charged with the duty of maintaining the way reasonably safe for plaintiff her invitee; that the proximate cause of the plaintiff's injury was the negligent invitation to plaintiff, her customer and invitee, to use the hallway when she knew, or should have known, of its dangerous condition; and that the defective state of the hallway was merely the condition which made the injury possible.

Defendant was in possession of the liquor store under an assignment of the lease made July 11, 1943. The night of the accident her husband was tending bar. Plaintiff testified that after having had drinks in the store, he started for the front door on his way to Warpack's restaurant and the bartender said to him "use the short cut, go through the rear door." Plaintiff did so. The rear door of defendant's store opened into the hallway. The hallway extended south about 25 feet to the rear door. Near the north end of the hallway on the east side, a door opened into the bakery and also on the east side a door opened into the restaurant. On the west side about midway between these doors two doors opened into toilets, one for the bakery and one for the restaurant. The toilet for the liquor store was within that store. The bakery stored flour, and the restaurant stored pop cases, in the hallway. The hallway was used for delivery purposes and it was not usual for customers to use it. Repairs in it were made by the owners. A porter for the bakery and Mr. Warpack cleaned the hallway. Cleaning was mutual. "Everybody cooperated to help."

Plaintiff alleged, and defendant denied, her possession and control of the hallway. Defendant's contention was, therefore, made an issue by the pleadings. Mrs. Warpack in her answer averred that the hallway was not common. We see no merit to plaintiff's contention that, for lack of traversing this averment, defendant is bound by it. Suffice on the point to say that it is a legal conclusion.

defendant showed the railway as a means of escape and as an
 invitation to plaintiff, charged with the duty of maintaining the way
 reasonably safe for plaintiff her invitee; that the proximate cause
 of the plaintiff's injury was the negligent invitation to plaintiff,
 her guest and invitee, to use the railway when the way, or
 should have known, of its dangerous condition; and that the defective
 state of the railway was solely the condition which bore the injury
 possible.

defendant was in possession of the premises upon which the
 assignment of the lease made July 11, 1881. The night of the
 accident her husband was passing by. Plaintiff testified that
 after having had dinner in the store, he started for the front door
 on his way to defendant's restaurant and the defendant told him
 "was the short cut, go through the back door." Plaintiff did so.
 The rear door of defendant's restaurant was opened into the railway. The
 railway extended south about 50 feet to the rear of the store. At the
 north end of the railway on the east side, a track crossed into the
 bakery and also on the east side a door opened into the defendant's
 On the west side of the railway between the store and the bakery
 into the bakery, one for the bakery and one for the restaurant. The
 tolls for the higher store were similar for both. The bakery
 stored flour, and the restaurant stored coal, in the railway.
 The railway was used for delivery purposes and it was not usual for
 customers to use it. Plaintiff in it was made up the owner. A
 porter for the bakery and the restaurant cleared the railway. Cleaning
 was mutual. "Everybody cooperated to help."

Plaintiff alleged, and defendant denied, her possession
 and control of the railway. Defendant's contention was, therefore,
 made an issue by the pleadings. Mrs. Frank in her answer averred
 that the railway was not common. She saw no merit in plaintiff's
 contention that, for lack of traversing this averment, defendant is
 to be held liable on the point to say that it is a legal com-

The lease covering the premises was introduced in evidence. From it and from the testimony it is clear in our view that the hallway was a common way for the use of the three stores. Defendant did not possess it and had no control over it. The landlord had possession and control of it, the consequent duty of maintaining it in a reasonably safe condition and the attendant liability for injuries arising out of a breach of the duty. Murphy v. Ill. State Trust Co., 375 Ill. 310; 32 Am. Jurs. p. 561, et seq. This duty on the part of the landlords extended to plaintiff who was on the premises under defendant's right. 32 Am. Juris. p. 567. Plaintiff says that he was defendant's invitee in the hallway. Precision is required here. As defendant's customer, plaintiff was her invitee on the premises. Assuming the truth of plaintiff's testimony, defendant through her husband, the bartender, invited plaintiff to use the rear door of the store and hallway on his way to the restaurant. This did not render plaintiff, defendant's invitee while he walked in the hallway to the restaurant so as to make applicable the rule of liability obtaining between invitor and invitee, where the former has control and possession of the premises. In the hallway plaintiff was invitee of the owners. Lessee is not responsible where the injury occurs in a common passageway not under the lessee's control. 32 Am. Jur. p. 699.

The cases, except one, cited by plaintiff to this point are those in which the invitor was in possession and control of the premises upon which the injury occurred. The exception is O'Shay v. Chicago Motor Coach Co., 328 Ill. App. 457, where a passenger on a bus was injured when she stepped off the bus. The rule under which the Coach Company was held liable, was that carriers must furnish passengers with a reasonably safe place to alight. It is plain that none of these cases are helpful to plaintiff in the instant case.

The lease covering the premises was introduced in evidence.
From it and from the testimony it is clear in our view that the
highway was a common way for the use of the above stores. Defendant
did not possess it and had no control over it. The landlord had
possession and control of it, the defendant only of maintaining
it in a reasonably safe condition and the defendant liability for
injuries arising out of a breach of the duty. Chicago Motor Coach Co. v. City of Chicago, 33 Ill. 2d 111, 215; 33 Ill. 2d 111, 215; 33 Ill. 2d 111, 215. This duty on
the part of the landlord extended to defendant and was on the
premises under defendant's right. Chicago Motor Coach Co. v. City of Chicago, 33 Ill. 2d 111, 215; 33 Ill. 2d 111, 215. Defendant is
liable that he was defendant's liability in the highway. Defendant is
liable here. As defendant's liability, defendant was not liable
on the premises. Assuming the duty of defendant to be liability,
defendant through her conduct, the defendant, defendant liability to
use the rear door of the store and falling on his way to the
restaurant. This did not render defendant's liability
while he walked in the highway to the restaurant as he was to take
applicable the rule of liability concerning between invitor and
invitee, where the former has control and possession of the premises.
In the highway liability was limited to the owner. Lessee is not
responsible where the injury occurs in a common passageway not under
the lessee's control. 33 Ill. 2d 111, 215; 33 Ill. 2d 111, 215.
The cases, except one, cited by plaintiff to this point
are those in which the invitor was in possession and control of the
premises upon which the injury occurred. The exception is City of Chicago v. Chicago Motor Coach Co., 33 Ill. 2d 111, 215; 33 Ill. 2d 111, 215, where a passenger on a
bus was injured when she stepped off the bus. The rule under which
the coach company was held liable, was that carriers were liable
passengers with a reasonably safe place to alight. It is plain
that none of these cases are helpful to plaintiff in the instant case.

Plaintiff says that in any event the negligent maintenance of the hallway was a mere condition and that the proximate cause of his injury was the negligence of the defendant in failing to protect him either by preventing his use of the hallway or by warning him against its dangerous condition, of which defendant knew, or should have known. Negligence presupposes breach of a duty. There was no duty here on defendant's part to do either of the things which plaintiff charges it was her duty to do. Furthermore, there is no evidence in the record to prove that defendant knew, or from which an inference can be drawn that she should have known, of the existence of the alleged dangerous condition.

The only duty that we can see which was owing to plaintiff under the circumstances of the instant case, was that of the landlord to which we have referred. Since there is no controversy about the material evidence, we hold as a matter of law that defendant is not liable for the injuries suffered by plaintiff.

Plaintiff assigned cross-errors upon the rulings of the trial court refusing him leave to file an amendment to his complaint and in admitting the lease. We see no error in the admission of the lease which was relevant on the question of possession and control. It is needless for us to pass upon the other claim of error assigned. The amendments offered were to conform the pleadings to the proof which we have already covered in our determination.

Plaintiff testified that he gave Mrs. Warpack a release for the \$2,500 he had received from her. Defendant seems to claim benefit of that release to bar this action against her. This claim was not made at the trial and, in view of our conclusions hereinabove, we need not decide whether we have the power to pass on the claim in this court.

We see no necessity of considering any other point.

For the reasons given the judgment is reversed and judgment is entered in this court for defendant against plaintiff.

JUDGMENT REVERSED AND JUDGMENT HERE
FOR DEFENDANT AGAINST PLAINTIFF.

LEWE, P.J. AND BURKE, J. CONCUR.

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...evidence in the record to show that defendant was at Brown and at consecutive

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existence of the alleged "new condition."

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Lord to which we have referred. Since there is no controversy, the

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and 75 dollars and as a matter of fact before this date

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request to publish reports and have been at all times in compliance with all instructions.

of nature, for the purpose of giving him the atmosphere of the .penitentiary

the most which we have to offer

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the \$,500 he had received from Mrs. Johnson, and that he had

1. How long has the company been in business?

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not decide whether we have the power to grant or deny the claim in this court.

understand the importance to vision on the

THESE ARE THE RESULTS OF THE RESEARCH AND ARE NOT TO BE USED FOR ANY OTHER PURPOSE.

. 20 minutes before scheduled test time and all devices

FROM THE DIRECTOR OF THE BUREAU OF INVESTIGATION
TO THE ATTORNEY GENERAL

43703

332 I.A. 138²

A. OGRODNIK; THE NATIONAL MINERAL
COMPANY, an Illinois Corporation,
and A. OGRODNIK, for the use of
The National Mineral Company,
Plaintiffs-Appellants,

v.

LOUIS CAPRON, HARRY SACKS, JOHN
DOE and MARY ROE,
Defendants.

HARRY SACKS,
Defendant-Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

262 A

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, A. Ogrodnik and The National Mineral Company, an alleged plaintiff, appeal from a judgment order of the Municipal Court of Chicago sustaining defendant Harry Sacks' motion to strike the fourth amended statement of claim, dismissing the suit, and ordering "that the defendant do have and recover from the plaintiff herein his damages for the use and detention of the property from the time it was taken until a return thereof shall be made, and his costs of suit and charges in this behalf by him expended and that execution issue for said costs of suit. And it is further ordered that a writ of retorno habendo do issue herein for the return of said property replevined herein by virtue of the writ of replevin issued in this cause."

On Saturday, December 9, 1944, there was filed a replevin suit in the name of A. Ogrodnik against Louis Capron, Harry Sacks, John Doe and Mary Roe. The statement of claim, signed by "A. Ogrodnik, Plaintiff," alleges that plaintiff, A. Ogrodnik, was lawfully entitled to the possession of 980 cartons of Helene Curtis Beauty Supplies and Equipment of the value not in excess of \$6,000. On the same day a writ of replevin issued, a replevin bond in the sum of \$12,000 was given to the bailiff, and the property was seized by that official, who did not relinquish

40704

1. THE NATIONAL SHIRT; YL400000 .A
2. THE NATIONAL SHIRT; YL400000 .A
3. THE NATIONAL SHIRT; YL400000 .A
4. THE NATIONAL SHIRT; YL400000 .A
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10. THE NATIONAL SHIRT; YL400000 .A

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THE UNIVERSITY OF CHICAGO

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the property to plaintiff until he was given an additional bond in the sum of \$6,000. The clerk's office of the Municipal Court closes at 12 noon on Saturdays. From subsequent pleadings filed by plaintiff it appears that A. Ogrodnik was a stenographer in the office of the attorneys for plaintiff and that she, individually, had no right to the possession of the property. The affidavit in support of the statement of claim was made by "H. Spitzer," a "stenographer" in the said office, "the duly authorized agent of plaintiff in the above entitled action." Defendant is justified in contending that the suing out of the writ of replevin by "A Ogrodnik, Plaintiff," was a flagrant abuse of the court's process. Appellants' claim that the filing of the suit in the name of A. Ogrodnik was to avoid disclosure to defendants of the fact that the merchandise had been located, does not justify the seizure of the goods at the suit of A. Ogrodnik. There was a simple, legal way to avoid disclosure of the commencement of the suit, viz., a motion to suppress publication of the suit. The verified statement of claim alleges that "the value of said property does not exceed \$6,000.00," but in subsequent statements of claim plaintiff alleges that the property seized was of the value of \$19,000.

The only defendant served was Harry Sacks, who filed an affidavit of defense, and the case was set for trial, but before the date for trial was reached a new attorney filed his appearance as an additional counsel for plaintiff, and asked leave to file an amended statement of claim, which leave was granted, and an amended statement of claim consisting of two counts was filed by plaintiff. The first count alleges that plaintiff was lawfully entitled to the possession of the property listed in Appendix A attached to the statement of claim, and that plaintiff's claim and cause of action is derived by assignment from

[illegible]

The National Mineral Company. The second count, in the alternative, is for goods, wares, and merchandise sold and delivered. Defendant's motion for an order directing plaintiff to file a more definite statement of claim specifically alleging how and why plaintiff is entitled to the possession of the property was allowed, and the second amended statement of claim, signed, "A. Ogrodnik Plaintiff," was filed. It alleges: "2. Said property is unlawfully detained by the defendants. Defendant Harry Sacks induced plaintiff to ship said goods to Indianapolis, Indiana, upon the representation that such property was for distribution in Indianapolis, Indiana and surrounding territory through a business opened there or to be opened there by defendant. Said representation was false and was known to be false to defendant at the time it was made. In fact defendant without the knowledge of plaintiff and immediately upon delivery to a warehouse in Indianapolis by plaintiff reshipped said goods to Chicago, and concealed the same in a store behind painted windows and, as plaintiff is informed and believes, began to sell such goods in Chicago contrary to the distribution program of plaintiff. Plaintiff shipped said goods in reliance upon the representation of defendant and would not have shipped such goods to defendant for sale in Chicago. Upon learning of the foregoing facts plaintiff rescinded the transaction. 3. * * * 4. The value of said property does not exceed Nineteen Thousand Dollars. 5. In case the property or some part thereof shall not be delivered to the bailiff under the writ the plaintiff will claim the value thereof. * * * 6. Plaintiff's claim and cause of action is derived by assignment from The National Mineral Company, an Illinois Corporation." The second count alleges, in the alternative, that "plaintiff's claim is for goods, wares, and merchandise sold and delivered to defendant at defendant's instance and request, for

which defendant has failed and refused to pay though often requested." Defendant's motion to strike that statement of claim was sustained and plaintiff then filed a third amended statement of claim, in which she alleges: "6. Plaintiff's claim and cause of action is derived from The National Mineral Company, an Illinois corporation, by an instrument dated December 8, 1944, a copy of which is attached as Exhibit I, and plaintiff is the actual bona fide owner of such claim for the purpose of suit, it having been necessary to avoid disclosure of the filing of this suit in order to prevent removal of the goods replevined herein." 7. (Here plaintiff realleges, in substance, paragraph 2 of the second amended statement of claim.) The third amended statement of claim also alleges:

"In the alternative, plaintiff's claim is for goods, wares and merchandise sold and delivered to defendant on or about December 8, 1944 at defendant's instance and request, for which defendant has failed and refused to pay though often requested." Exhibit I, attached to the third amended statement of claim, purports to be a letter of The National Mineral Company, 2638 North Pulaski Road, Chicago, Illinois, dated December 8, 1944, which reads as follows:

"TO WHOM IT MAY CONCERN:

"The National Mineral Company hereby assigns to A. O'Grodnik all claims of any kind or nature and any causes of action which it may have against Harry Sacks or Louis Capron, including all claims and causes of action relating to merchandise shipped to Indianapolis consigned to Harry Sacks and thereafter removed from Indianapolis without the knowledge or consent of the company, and including a claim for the balance of said goods wherever located.

"The assigner hereby authorizes the said A. O'Grodnik to institute any suits or take any action necessary to obtain possession of

[illegible]

said goods.

"THE NATIONAL MINERAL COMPANY

"BY (Signed) G. Gidwitz"

(Italics ours.)

Upon motion of defendant the third amended statement of claim was stricken, and plaintiff thereafter filed a "4th Amended Statement of Claim," which purports to be a joint complaint of plaintiffs A. Ogrodnik and The National Mineral Company, hereinafter sometimes called appellants.

Count I alleges:

"The plaintiff A. Ogrodnik, claims as follows:

"1. The plaintiff is lawfully entitled to the possession of the following described property: [Here follows a description of the property.]

"2. Said property is unlawfully detained by the defendants or either of them.

"3. Said property has not been taken for any tax, assessment or fine levied by virtue of any law of this state against the property of the plaintiff or against the plaintiff individually, nor seized under any execution or attachment against the goods and chattels of the plaintiff liable to execution or attachment, nor held by virtue of any writ of replevin against the plaintiff.

"4. The value of said property does not exceed \$19,000.00.

"5. In case the property or some part thereof shall not be delivered to the bailiff under the writ the plaintiff will claim the value thereof. The total value the plaintiff believes to be \$19,000.00."

Count II is as follows:

"Plaintiff, the National Mineral Company, in the alternative, claims as follows:

said goods.

"THE NATIONAL MINERAL COMPANY"

"THE NATIONAL MINERAL COMPANY"

(Italics ours.)

Upon motion of defendant the following amended statement of claim was submitted, and plaintiff agreed to file a fourth amended statement of claim, which should be a joint complaint of plaintiff and defendant. The National Mineral Company, defendant, claims the following:

Count I, in law:

"The National Mineral Company, defendant, claims the following:

1. The National Mineral Company, defendant, claims the possession of the following property, to-wit: (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m) (n) (o) (p) (q) (r) (s) (t) (u) (v) (w) (x) (y) (z) (aa) (ab) (ac) (ad) (ae) (af) (ag) (ah) (ai) (aj) (ak) (al) (am) (an) (ao) (ap) (aq) (ar) (as) (at) (au) (av) (aw) (ax) (ay) (az) (ba) (bb) (bc) (bd) (be) (bf) (bg) (bh) (bi) (bj) (bk) (bl) (bm) (bn) (bo) (bp) (bq) (br) (bs) (bt) (bu) (bv) (bw) (bx) (by) (bz) (ca) (cb) (cc) (cd) (ce) (cf) (cg) (ch) (ci) (cj) (ck) (cl) (cm) (cn) (co) (cp) (cq) (cr) (cs) (ct) (cu) (cv) (cw) (cx) (cy) (cz) (da) (db) (dc) (dd) (de) (df) (dg) (dh) (di) (dj) (dk) (dl) (dm) (dn) (do) (dp) (dq) (dr) (ds) (dt) (du) (dv) (dw) (dx) (dy) (dz) (ea) (eb) (ec) (ed) (ee) (ef) (eg) (eh) (ei) (ej) (ek) (el) (em) (en) (eo) (ep) (eq) (er) (es) (et) (eu) (ev) (ew) (ex) (ey) (ez) (fa) (fb) (fc) (fd) (fe) (ff) (fg) (fh) (fi) (fj) (fk) (fl) (fm) (fn) (fo) (fp) (fq) (fr) (fs) (ft) (fu) (fv) (fw) (fx) (fy) (fz) (ga) (gb) (gc) 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Count II is as follows:

"Plaintiff, the National Mineral Company, in the alternative,

claims as follows:

"1-5. Plaintiff realleges paragraphs 1-5 of Count I as paragraphs 1 to 5 of this Count II."

Count III is as follows:

"Plaintiffs, The National Mineral Company and A. Ogrodnik, in the alternative, claim as follows:

"1-5. Plaintiffs reallege paragraphs 1-5 of Count I as paragraphs 1 to 5 of this Count III."

Count IV is as follows:

"Plaintiff, A. Ogrodnik, in the alternative, claims as follows:

"1-5. Plaintiff realleges paragraphs 1 to 5 of Count I as paragraphs 1 to 5 of this Count IV.

"6. Plaintiff is an agent for The National Mineral Company, the owner of said property."

Count V is as follows:

"Plaintiff, A. Ogrodnik, in the alternative, claims as follows:

"1-5. Plaintiff realleges paragraphs 1 to 5 of Count I as paragraphs 1 to 5 of this Count V.

"6. Plaintiff sues as assignee of a non-negotiable chose in action, assigned by The National Mineral Company to plaintiff on and before December 8, 1944, by written and oral authorization. In the alternative, plaintiff is assignee of the said property by assignment of The National Mineral Company to plaintiff on and before December 8, 1944. Plaintiff is the bona fide owner of said chose in action, property and claims."

Count VI is as follows:

"Plaintiff, A. Ogrodnik, in the alternative, claims as follows:

"1-5. Plaintiff realleges paragraphs 1 to 5 of Count I as paragraphs 1 to 5 of this Count VI.

"6. Plaintiff is the legal owner of said claim and

-5-

"1-5. Plaintiff realleges paragraphs 1-4 of Count I

as paragraphs 1 to 4 of this Count II."

Count III is as follows:

"1-1. Plaintiff, the National Farmers Union, hereby

alleges, in the alternative, that it is as follows:

"1-2. Plaintiff realleges paragraphs 1-4 of Count I as

paragraphs 1 to 4 of this Count III."

Count IV is as follows:

"1-3. Plaintiff, the National Farmers Union, hereby

alleges:

"1-4. Plaintiff realleges paragraphs 1-4 of Count I

as paragraphs 1 to 4 of this Count IV."

"1-5. Plaintiff realleges paragraphs 1-4 of Count I as

paragraphs 1 to 4 of this Count V."

Count V is as follows:

"1-6. Plaintiff, the National Farmers Union, hereby

alleges:

"1-7. Plaintiff realleges paragraphs 1-4 of Count I

as paragraphs 1 to 4 of this Count VI."

"1-8. Plaintiff realleges paragraphs 1-4 of Count I as

paragraphs 1 to 4 of this Count VII."

"1-9. Plaintiff realleges paragraphs 1-4 of Count I as

paragraphs 1 to 4 of this Count VIII."

"1-10. Plaintiff realleges paragraphs 1-4 of Count I as

paragraphs 1 to 4 of this Count IX."

"1-11. Plaintiff realleges paragraphs 1-4 of Count I as

paragraphs 1 to 4 of this Count X."

"1-12. Plaintiff realleges paragraphs 1-4 of Count I as

paragraphs 1 to 4 of this Count XI."

Count XII is as follows:

"1-13. Plaintiff realleges paragraphs 1-4 of Count I

as paragraphs 1 to 4 of this Count XII."

"1-14. Plaintiff is the legal owner of said claim and

property as trustee for The National Mineral Company, the beneficial owner thereof, and said legal title was assigned to plaintiff by The National Mineral Company on and before December 8, 1944, by written and oral authorization. Plaintiff is the bona fide owner of the legal title to said claim and property."

Count VII is as follows:

"Plaintiff, A. Ogrodnik, claims as follows:

"1-5. Plaintiff realleges paragraphs 1-5 of Count I as paragraphs 1 to 5 of this Count VII.

"6. Plaintiff sues as plaintiff for the use of The National Mineral Company."

Count VIII in the alternative is as follows:

"Plaintiff, A. Ogrodnik, claims as follows:

"1-5. Plaintiff realleges paragraphs 1-5 of Count I as paragraphs 1 to 5 of this Count VIII.

"6. Plaintiff's claim and cause of action is derived from The National Mineral Company, an Illinois corporation, by oral authorization on or before December 8, 1944, and by an instrument dated December 8, 1944, stating as follows: [Here follows the letter of The National Mineral Company heretofore quoted.]"

Count IX in the alternative is as follows:

"1-6. Plaintiff realleges paragraphs 1 to 6 of Count VIII.

"7. Plaintiff is the actual bona fide owner of the chose in action assigned thereby."

"WHEREFORE plaintiff claims as follows:

"1. The plaintiff claims a writ of replevin and seizure and delivery of possession of the property and damages of the value of so much of the property as is not delivered, as damages and damages for the detention.

"2. Damages of \$10,000.00 for the value of the property

property as granted for the National Mineral Company, the same-
ficially owned, and said legal title was assigned to
plaintiff by the National Mineral Company and before the
3, 1947, by written and oral testimony. Plaintiff is the
owner of the title to the land and property.

Plaintiff is the owner of the land and property.

"2-2. Plaintiff is the owner of the land and property.

Plaintiff is the owner of the land and property.

"3. Plaintiff is the owner of the land and property.

Plaintiff is the owner of the land and property.

"4. Plaintiff is the owner of the land and property.

"5. Plaintiff is the owner of the land and property.

"6. Plaintiff is the owner of the land and property.

"7. Plaintiff is the owner of the land and property.

"8. Plaintiff is the owner of the land and property.

"9. Plaintiff is the owner of the land and property.

"10. Plaintiff is the owner of the land and property.

"11. Plaintiff is the owner of the land and property.

"12. Plaintiff is the owner of the land and property.

quoted."

"13. Plaintiff is the owner of the land and property.

"14. Plaintiff is the owner of the land and property.

VIII.

"1. Plaintiff is the owner of the land and property.

in action and property."

"2. Plaintiff is the owner of the land and property.

"3. The plaintiff claims a right of possession and recovery

and delivery of possession of the property and damages of the
value of so much of the property as is not delivered, as damages

and damages for the detention.

"4. Damages of \$10,000.00 for the value of the property

not delivered to plaintiff and for the taking, detention and conversion thereof by defendant.

"3. In the alternative plaintiff claims the value of the property not seized under the writ.

[Signed] "A. Ogrodnik & The National Mineral Company, Plaintiffs

"Adolph A. Rubinson & Alster,
Berger and Wald, Attorneys
for plaintiffs

"I, A. Ogrodnik make oath and say as follows:

"1. My age is legal years, my office is 100 W. Monroe Street.

"2. I am a plaintiff in the above entitled action and agent for The National Mineral Company, plaintiff, and as such have full knowledge of the facts relating to the above Statement of claim.

"3. The facts alleged in said statement of claim are true.

[Signed] "A O'Grodnik

"Subscribed and Sworn to Before
Me This 7th day of November, 1945.

"Helen Berenice Spitzer
"Notary Public SEAL"

Then appears the following:

"COUNT X, IN THE ALTERNATIVE

"Plaintiff, A. Ogrodnik, or The National Mineral Company,
claims as follows:

Particulars

"October 27, 1944 to November 13, 1944
8 shipments \$18,928.80

"2. There are no credits or set offs to said claim.

"3. Plaintiff claims judgment for \$19,928.80.

[Signed] "A. Ogrodnik and the National Mineral
Company" (Italics ours.)

Defendant Harry Sacks filed a motion to strike the fourth amended statement of claim and in support of the motion set up

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The motion for summary judgment was not delivered to the court until after the conversation between the parties on the day of the hearing. In the absence of any other evidence, the court found in favor of the defendant.

Exhibits 1 through 10 were introduced in evidence.

Exhibit 1 is a letter from the defendant to the plaintiff dated January 1, 1964.

Exhibit 2 is a letter from the plaintiff to the defendant dated January 1, 1964. Exhibit 3 is a letter from the defendant to the plaintiff dated January 1, 1964. Exhibit 4 is a letter from the plaintiff to the defendant dated January 1, 1964. Exhibit 5 is a letter from the defendant to the plaintiff dated January 1, 1964. Exhibit 6 is a letter from the plaintiff to the defendant dated January 1, 1964. Exhibit 7 is a letter from the defendant to the plaintiff dated January 1, 1964. Exhibit 8 is a letter from the plaintiff to the defendant dated January 1, 1964. Exhibit 9 is a letter from the defendant to the plaintiff dated January 1, 1964. Exhibit 10 is a letter from the plaintiff to the defendant dated January 1, 1964.

The court found that the defendant's motion for summary judgment was timely and that the plaintiff's motion for summary judgment was not timely.

The court found that the defendant's motion for summary judgment was timely and that the plaintiff's motion for summary judgment was not timely.

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The court found that the defendant's motion for summary judgment was timely and that the plaintiff's motion for summary judgment was not timely.

many grounds, certain of which we will hereafter refer to in this opinion. On November 28, 1945, the trial court sustained defendant's motion to strike the fourth amended statement of claim and an order was entered to that effect. As no further motion was made by plaintiff the trial court then entered the judgment order in question. On December 18, 1945, appellants filed a motion that the judgment be vacated, which motion was denied. We will again refer to that motion.

Appellants contend that the fourth amended statement of claim sets out a cause of action in replevin and in contract, and that the trial court erred in striking that statement of claim. It has been held that a motion to strike upon the ground that the statement of claim has not stated a cause of action is a sufficient compliance with the Civil Practice Act (see Bohnert v. Ben Hur Life Ass'n, 362 Ill. 403, 408), but in the instant case, as before stated, defendant's motion to strike alleges numerous substantive defects in the fourth amended statement of claim. Replevin is an extraordinary remedy governed solely by statute, and the provisions of the statute must be strictly followed. Replevin is a possessory action, and the plaintiff must recover, if at all, on the strength of his own title or his right to immediate possession, and not on the weakness or lack of title or right of possession of the defendant. (Pease v. Ditto, 189 Ill. 456; Forgan v. Gordon Motor Finance Co., 350 Ill. 445, 449.) The right of possession is essential to maintain the action and it is necessary that the plaintiff be entitled to the property at the time the writ was sued out. (Moriarty v. Stofferan, 89 Ill. 528.)

In their brief appellants treat The National Mineral Company as the real party in interest and in the fourth amended statement of claim the pleader artfully attempted to join The

National Mineral Company as an additional plaintiff. Defendant Sacks contended upon the motion to strike and contends here that The National Mineral Company had no standing as a party plaintiff, was, in fact, a stranger to the suit, and that therefore defendant was not obliged to answer the fourth amended statement of claim, which purports to be a pleading filed by "A.Ogrodnik & The National Mineral Company, Plaintiffs," and that his motion to strike was the proper and apt way in which to attack the fourth amended statement of claim. This contention is clearly a meritorious one. No request was made by plaintiff A. Ogrodnik nor by The National Mineral Company to allow that Company to become a party plaintiff to the suit, nor was any order of court entered granting leave to The National Mineral Company to become a party plaintiff. Municipal Court Rule 21 and Section 26 of the Practice Act provide that new parties may be added to a cause on order of the court. Appellants contend that The National Mineral Company had the right under Section 22a of the Illinois Replevin Act to intervene in the cause and that the trial court erred in denying that Company leave to intervene. It is a sufficient answer to this contention to state that that Company, although it had practically a year in which to intervene in the cause, did not see fit to exercise that right until some time after the instant judgment was entered. The reason why it did not in apt time and in a proper way file a petition for leave to intervene is obvious. If it ~~had~~ filed such a petition it would have to directly challenge the right of plaintiff A. Ogrodnik to possession of the property, and to avoid imperiling her suit appellants attempted, in the fourth amended statement of claim, to make The National Mineral Company an additional plaintiff to the proceedings. The attorneys for A. Ogrodnik are also the attorneys for The National Mineral Com-

National Mineral Company as an additional plaintiff. Defendant
and sacks contained upon the motion to strike and contents here
that the National Mineral Company had no standing as a party
plaintiff, was, in fact, a stranger to the suit, and that there-
fore defendant was not obliged to answer the complaint amended
statement of claim, which purports to be a plaintiff filed by
"A. Ogorodnik - The National Mineral Company, Plaintiff," and
that his motion to strike was the proper and only way in which
to attack the fourth amended statement of claim. This contention
is clearly a jurisdictional one. No answer was made by plaintiff
A. Ogorodnik nor by The National Mineral Company to allow that
Company to become a party plaintiff to the suit, nor was any
order of court entered granting leave to The National Mineral
Company to become a party plaintiff. Defendant on July 21
and Section 27 of the Practice Act provide that new parties may
be added to a cause on order of the court. Defendant contends
that The National Mineral Company is a party under Section
22A of the Illinois "Judiciary Act" so intervene in the cause and
that the trial court erred in ruling that Company have to
intervene. It is a sufficient answer to this contention to state
that that Company, although it had practically a year in which to
intervene in the cause, did not see fit to exercise that right
until some time after the instant judgment was entered. The
reason why it did not in apt time and in a proper way file a
petition for leave to intervene is obvious. If it filed such
a petition it would have to directly challenge the right of
plaintiff A. Ogorodnik to possession of the property, and to
avoid impugning her suit appellants attempted, in the fourth
amended statement of claim, to make The National Mineral Company
an additional plaintiff to the proceedings. The attorneys for
A. Ogorodnik are also the attorneys for The National Mineral Com-

pany. Section 4 of the Replevin Act provides that "The person bringing such action shall, before the writ issues, file with the clerk * * * an affidavit," and Section 10 provides that "Before the execution of any writ of replevin the plaintiff * * * shall give to the sheriff * * * or other officer a bond with sufficient security in double the value of the property about to be replevied." The National Mineral Company complied with neither requirement. If that Company had filed a motion for leave to become a party plaintiff to the suit upon the grounds it now urges, that it is the real party in interest, the trial court would undoubtedly have ruled that the proper way for it to assert its right to possession was by intervening in accordance with the provisions of the Act; but, in any event, the court could not properly allow it to become a party plaintiff to the suit until it furnished the bond required by the statute. A fortiori, A. Ogrodnik, plaintiff, in the original statement of claim alleged that she was entitled to the possession of the property, and upon that statement the writ of replevin issued and the property was seized. As she could only recover on the strength of her right to immediate possession, to permit her to interject into the suit The National Mineral Company as an additional party plaintiff would, in effect, permit her to plead the right of possession of the property in a third person. Holler v. Coleson, 23 Ill. App. 324, was an action brought upon a bond given in a replevin suit where the plaintiff permitted the suit to be dismissed. The plaintiff in the replevin suit attempted to plead the right of possession in another, to which contention the court said (p. 330):

"If the replevin suit had gone to trial on its merits, the plaintiff would not be entitled to plead property in a party other than himself, to assist him in the recovery, the law being that he must recover, if at all, on the strength of his own

title, not on the weakness of his adversaries. * * * The law being that on a trial of the issues in a replevin suit that the defendant's title can not be attacked by the plaintiff unless he show property in himself, we see no reason in equity or justice in holding that the plaintiff should be allowed to attack it in a suit against him on the replevin bond, even in mitigation of damages. If a plaintiff, having no title or claim to property, replevy it, he partakes of the character of a wrong-doer for intermeddling with property in the possession of another in which he has no interest. When, by his replevin, he undertakes to show property in himself against the possessor, the statute requires him to give bond to the latter for its return, if he fail to prosecute his suit successfully and without delay. * * * it would be a perversion of justice and a violation of the terms of his bond and the spirit and letter of the statute, to allow him to depreciate the damages * * * by showing the title in the property to be in another * * *." This case was cited with approval by Mr. Justice Gary in Chapin v. Matson, 37 Ill. App. 257.

Appellants contend that the order permitting A. Ogrodnik to file the fourth amended statement of claim was, in effect, a permission to plaintiff to join The National Mineral Company as an additional plaintiff. Such an argument requires no answer. The National Mineral Company had a right to intervene in the manner prescribed by the statute, but leave to intervene must be sought during the pendency of a suit and not after judgment has been entered between the original parties. (In re Estate of Reemts, 383 Ill. 447; In re Belleville Bank & Trust Co., 302 Ill. App. 359, 363.) The contention of appellants that the question as to the right of plaintiff A. Ogrodnik to make The National Mineral Company an additional plaintiff in the suit involves, at most, a misjoinder of parties, is without merit, and in this connection it is well to repeat that this is a replevin action, an

title, not on the weakness of his adversaries. * * * The law being that on a trial of the issues in a replevin suit that the defendant's title can not be attacked by the plaintiff unless he show property in himself, we see no reason in equity or justice in holding that the title should be allowed to attack it in a suit against him on the replevin bond, even in mitigation of damages. If a plaintiff, having no title or claim to property replevy it, he purchases of the character of a wrong-doer for intermeddling with property in the possession of another in which he has no interest. When, by his replevin, he undertakes to show property in himself against the possessor, the statute requires him to give bond to the plaintiff for the return of the property, and to prosecute in due season and with diligent effort, * * * it would be a perversion of justice and a violation of the terms of his bond and the statute if he, of the plaintiff, to allow him to repudiate his purchase of the title in the property to be in another's hands. The law is settled with authority by the Supreme Court in *Wheeler v. State*, 11 Ill. 377. Application is made to the court appointing A. Geronimi to file the only original complaint of this case, in effect, a petition to admit him to join the National Mineral Company as an additional plaintiff. It is an attempt to alter the answer. The National Mineral Company had a right to intervene in the manner prescribed by the statute, but it is to intervene must be sought during the pendency of suit and not after judgment has been entered between the original parties. (Ill. Statute of 1907, 333 Ill. 447; *Ill. Statute of 1907*, 333 Ill. 447; *Ill. Statute of 1907*, 333 Ill. 447.) The contention of appellants that the question as to the right of plaintiff A. Geronimi to make The National Mineral Company an additional plaintiff in the suit involves, at most, a misjoinder of parties, is without merit, and in this connection it is well to repeat that this is a replevin action, and

extraordinary remedy governed solely by statute, and the provisions of the statute must be strictly followed. Section 26 of the Civil Practice Act was not intended to dispense with any of the requirements of the Replevin Act. Moreover, that section provides that new parties may be added and parties misjoined may be dropped by order of the court, as the ends of justice may require. Certainly, the ends of justice did not require that The National Mineral Company be allowed to interject itself as an additional plaintiff in the cause without an order of court and without complying with the requirements of the Replevin Act that were enacted to protect a defendant against an unwarranted seizure of the property in question. We hold that The National Mineral Company had no standing as a plaintiff in the case at bar, and for that reason, alone, defendant was not required to answer the fourth amended statement of claim, which purports to be a joint statement of claim of plaintiffs A. Ogrodnik and The National Mineral Company. There are, however, other good reasons why the order to strike that statement was justified. While Count I sets up a claim of A. Ogrodnik to the right of possession of the property, Count II sets up a claim of The National Mineral Company to the right of possession of the property. As the fourth amended statement of claim is filed by plaintiffs A. Ogrodnik and The National Mineral Company, Count II is, in effect, a plea by A. Ogrodnik of the right of possession of the property in a third person. Count III contains the same vice. Count X is a claim of "Plaintiff, A. Ogrodnik, or The National Mineral Company." (Italics ours.) A. Ogrodnik, in the fourth amended statement of claim, sues in her own right; also as "an agent for The National Mineral Company, the owner of said property"; "as assignee of a non-negotiable chose in action, assigned by The National Mineral Company to plain-

extraordinary remedy governed solely by statute, and the provisions of the statute must be strictly followed. Section 26 of the Civil Practice Act was not intended to dispense with any of the requirements of the Replevin Act. Moreover, that section provides that new parties may be added and parties disjoined may be dropped by order of the court. As this right of justice may require, the ends of justice did not require that The National Mineral Company be allowed to interpose itself as an additional plaintiff in the same action an order of court and without complying with the requirements of the Replevin Act that were essential to protect a party who was not ~~unwarranted~~ seizure of the property in question. It held that The National Mineral Company had no standing as a plaintiff in the case as it was, and for that reason, alone, its claim was not required to answer the fourth amended statement of claim, which purports to be a joint statement of claim of plaintiffs, A. Ozyrdnik and The National Mineral Company. There are, however, other good reasons why the order to strike that statement was justified. While Count I sets up a claim of A. Ozyrdnik to the right of possession of the property, Count II sets up a claim of The National Mineral Company to the right of possession of the property. As the fourth amended statement of claim is filed by plaintiffs, A. Ozyrdnik and The National Mineral Company, Count II is, in effect, a plea by A. Ozyrdnik of the right of possession of the property in a third person. Count III contains the same vice. Count I is a claim of "Plaintiff, A. Ozyrdnik, of The National Mineral Company." (Italics ours.) A. Ozyrdnik, in the fourth amended statement of claim, sets in her own right; also as "an agent for The National Mineral Company, the owner of said property"; "as assignee of a non-negotiable promissory note assigned by The National Mineral Company to plain-

tiff on and before December 8, 1944, by written and oral authorization"; "as plaintiff for the use of The National Mineral Company"; as assignee authorized "to institute any suits or take any action necessary to obtain possession of said goods." The correct pleadings in a replevin suit are simple. We question if a more anomalous pleading was ever filed by a plaintiff in a replevin suit than the fourth amended statement of claim in the instant case. Most of the ten counts are inconsistent and contradictory to other counts. It would unduly lengthen this opinion to pass upon the many points raised by defendant in support of the action of the trial court in striking the fourth amended statement of claim. Section 33 of the Civil Practice Act and Rule 27 of the Municipal Court Rules provide that a plaintiff shall state a plain, concise and specific cause of action in his statement of claim. Appellants insist that their pleading should be given a liberal construction in accordance with the spirit of the Civil Practice Act. Our Supreme court, in a late case, Palmer v. Miller, 380 Ill. 256, 262, states: "There is nothing in the present Practice act which excuses the pleader from stating his case with clarity and direction." It is idle to argue that the pleader who drafted appellants' fourth amended statement of claim stated appellants' case with clarity and direction. Indeed, the very nature of the argument that appellants have been compelled to make shows clearly that appellants practically conceded that the pleading in question was vulnerable to the motion to strike. At the time that the judgment was entered in the instant case counsel for appellants intended to stand by the fourth amended statement of claim, but they later concluded that it would not be wise to do so, and a number of days after the judgment had been entered they filed a motion to vacate the judgment "and give specific leave to The National Mineral Company to be joined as party plaintiff or as

National Mineral Company to be joined as party plaintiff or as motion to vacate the judgment "and give specific leave to The number of days after the judgment had been entered they filed a they later concluded that it would not be wise to do so, and a intended to stand by the fourth amended statement of claim, but judgment was entered in the instant case counsel for appellants was vulnerable to the notion to strike. At the time that the appellants practically conceded that the pleading in question appellants have been compelled to make show clearly that and direction. Indeed, the very nature of the argument that amended statement of claim stated appellants' case with clarity is able to argue that the pleader who drafted appellants' fourth pleader from stating his case with clarity and direction." It "There is nothing in the present practice act which excuses the in a late case, *Holmes v. Miller*, 380 Ill. 250, 252, states: with the spirit of the Civil Practice Act. Our Supreme court, pleading should be given a liberal construction in accordance action in his statement of claim. Appellants insist that their plaintiff shall state a plain, concise and specific case of Act and Rule 27 of the Municipal Court Rules provide that a amended statement of claim. Section 32 of the Civil Practice support of the action of the trial court in striking the fourth opinion to pass upon the many points raised by defendant in contradictory to other courts. It would mainly lengthen this the instant case. Most of the two counts are inconsistent and a reply in suit than the fourth amended statement of claim in all a more anomalous pleading was ever filed by a plaintiff in correct pleadings in a reply in suit are simple. No question any action necessary to obtain possession of said goods." The party; as assignee authorized "to institute any suits or take action;" as plaintiff for the use of The National Mineral Company on and before December 8, 1944, by written and oral author-

a claimant under a trial right of property or in the alternative to confirm the joining of such party under previous orders of court." In this court appellants ask us to remand the cause with instructions to the trial court "to sustain the motion of plaintiffs to make The National Mineral Company an additional party plaintiff or to permit it to intervene." After a careful consideration of the record we are satisfied that the trial court was justified in denying the motion to vacate the judgment, etc.

Appellants conclude their brief as follows: "If Section 22a [of the Replevin Act] is to be disregarded, as it was by the Court below, National's only alternative is a separate suit against the defendants"; that the real parties in interest are The National Mineral Company and defendant Sacks, and that "eventually, however, the issue between National and Harry Sacks must be drawn." If appellants' present theory of fact is supported by the real circumstances that surrounded the transaction it is surprising that the original complaint was not filed on behalf of that Company; instead, the goods were seized upon a statement of claim in which the plaintiff, individually, had absolutely no right to the possession of the property.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

18

THE END OF THE WORLD

43876

332 I.A. 139

WALTER R. MARTIN,
Appellant,

v.

KLIPFEL MANUFACTURING
COMPANY,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

263

X

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant under the Federal Fair Labor Standards Act of 1938 to recover compensation for 200 hours overtime work at defendant's factory during certain months of the year 1945 and for counsel fees. Under the Act, if plaintiff was entitled to recover, he would be entitled to recover double the amount due as liquidated damages and would also be entitled to reasonable attorney's fees. The case was tried by the court without a jury and plaintiff appeals from a judgment entered in favor of defendant.

It is admitted that defendant was engaged in interstate commerce and came under the provisions of the Act and that plaintiff worked 200 hours overtime at defendant's factory during the period in question. Defendant's defense is that plaintiff was manager of its Production Control Department and that he was employed in an executive capacity within the meaning of Section 13 of the Act, which provides that the provisions of Section 7 of the Act [the section relating to compensation for overtime work] shall not apply with respect to any employee employed in a bona fide executive or administrative capacity, and that therefore plaintiff was in the exempt class. The entire definition of said term "bona fide executive" is as follows:

"Section 541.1. Executive. The term 'Employee employed in a bona fide executive * * * capacity' in section 13 (a) (1) of the Act shall mean any employee

43876

APPELLANT
CITY OF CHICAGO

WALTER R. MARTIN
Appellant
v.
KILPATRICK TRADING
COMPANY
Defendant

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Plaintiff, also defendant under the Federal Labor

Standards Act of 1938 to recover compensation for 200 hours

overtime work at defendant's factory during certain months of

the year 1944 and for certain years. Under the Act, if plain-

tiff was entitled to recovery, he would be entitled to recover

double the amount due as if he had been paid for such work as he

was entitled to reasonably ascertained facts. The case was tried by

the court without a jury and plaintiff obtained a judgment

entered in favor of defendant.

It is admitted that defendant was engaged in interstate

commerce and was under the provisions of the act and that plain-

tiff worked 200 hours overtime at defendant's factory during

the period in question. Plaintiff's case is that plaintiff

was manager of the Production Control Department and that he was

employed in an executive capacity within the meaning of Section 7

of the act, which provides that the provisions of Section 7

of the act [the section relating to compensation for overtime

work] shall not apply with respect to any employee employed in

a bona fide executive or administrative capacity, and that there-

fore plaintiff was in the exempt class. The entire definition

of said term "bona fide executive" is as follows:

"Section 7(a)(1) Executive. The term 'employee employed

in a bona fide executive or administrative capacity' in section 7(a)(1)

of the act shall mean any employee

"(a) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

"(b) who customarily and regularly directs the work of other employees therein, and

"(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and

"(d) who customarily and regularly exercises discretionary powers, and

"(e) who is compensated for his services on a salary basis at not less than \$30 per week (exclusive of board, lodging, or other facilities), and

"(f) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction: Provided, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment."

Both parties concede that "the Administrator's Regulations have the force of law just as if they were written in the statute," and that "all six conditions of the executive exemption must be proven." The employer has the burden of proof of establishing an exemption and before an employee may be denied overtime payment as an executive the six conditions must be fulfilled, for they are in the conjunctive. See Helliwell v. Haberman, 140 F. 2d 833, 834. Other cases to the same effect might be cited if it were necessary. Plaintiff admits that "defendant proved

"(a) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

"(b) who customarily and regularly directs the work of other employees therein, and

"(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and

"(d) in substantially and regularly exercises discretionary powers, and

"(e) who is compensated for his services on a salary basis at not less than \$6 per week (exclusive of board, lodging or other facilities), and

"(f) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 40 percent of the number of hours worked in the week in the nonexempt employees under his direction. Provided, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment."

Both parties concede that the Administrative Code provisions have the force of law just as if they were written in the statute, and that "all six conditions of the executive exemption must be proven." The employer has the burden of proof of establishing an exemption and before an employee may be denied overtime payment as an executive the six conditions must be fulfilled for they are in the conjunctive. See Helms v. Helms, 140 F. 2d 833, 834. Other cases to the same effect might be cited if it were necessary. Plaintiff admits that "defendant proved

he fulfilled the requirements of Regulations 541-1-(A), (B), (C), (D) and (E)," but contends that defendant had also the burden of proving that plaintiff was an exempt employee under (F), and that it failed to sustain that burden. Plaintiff contends that the fact that he was "Production Control Manager" did not make him exempt, and that "the weight of the evidence shows Martin's hours of work of the same nature as that performed by nonexempt employees exceed 20% of the number of hours worked in the workweek by the nonexempt employees under his direction." Defendant contends that "the weight of the evidence shows Martin did not perform in excess of 20 percent of work in the workweek of the same nature as that performed by nonexempt employees, under his direction," and that therefore Martin was an exempt employee. The sole question that the trial court was called upon to determine was whether plaintiff was a nonexempt employee under (f) of the Regulations. For some reason not shown by the record the trial court ignored the only question that he was called upon to decide. The following is the opinion rendered by the court: "In the case at bar, the defendant has proven by a preponderance of the evidence that the plaintiff was employed in a bona fide executive and administrative capacity, and therefore the plaintiff comes within the Act under sub-section 7 of Section 13, A-1. For these reasons the finding will be for defendant."

There is considerable feeling in this case and the sole question of fact before the court was hotly contested. Each party attacks the credibility of the witnesses produced by the other party, and it is clear that the determination of the sole question in this case turns upon the credibility of the witnesses.) A careful trial judge will be in a far better position than we to pass upon the credibility of the witnesses and the weight that should

he fulfilled the requirements of regulations 41-1-(a), (b), (c), (d) and (e), but contends that defendant had also the burden of proving that plaintiff was an exempt employee under (f), and that it failed to sustain that burden. Plaintiff contends that the fact that he was "Production Control Manager" did not make him exempt, and that "the weight of the evidence shows that the hours of work of the same nature as that performed by non-exempt employees exceed 100 of the number of hours worked in the week by the non-exempt employees under his direction." Plaintiff contends that "the weight of the evidence shows that the hours of work of the same nature as that performed by non-exempt employees, and that plaintiff was an exempt employee. The sole question in this trial court was called upon to determine whether plaintiff was a non-exempt employee under (f) of the regulations. For some reason not shown by the record the trial court failed to find that plaintiff was called upon to testify. The finding in the trial court rendered by the court: "In the case of law, the defendant has proven by a preponderance of the evidence that the plaintiff was employed in a bona fide executive and administrative capacity, and therefore the plaintiff comes within the Act under subsection 7 of Section 13, A-1. For these reasons the finding will be for defendant."

There is considerable feeling in this case and the sole question of fact before the court was hotly contested. Each party attacks the credibility of the witnesses pro used by the other party, and it is clear that the determination of the sole question in this case turns upon the credibility of the witnesses. A case and trial judge will be in a far better position than we to pass upon the credibility of the witnesses and the weight that should

be given to their testimony.

After a careful study of the record we have reached the conclusion that justice will best be served by a retrial of this cause, and we therefore refrain from analyzing and commenting upon the evidence that bears upon the vital question. If plaintiff should prevail he is entitled under the Act to reasonable attorney's fees.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Friend, F. J., and Sullivan, J., concur.

be given to their testimony.

After a careful study of the record we have reached the conclusion that justice will best be served by a retrial of this case, and we therefore refrain from analyzing and commenting upon the evidence and facts upon the vital question. If plaintiff should prevail he is entitled under the Act to reasonable attorney's fees.

The judgment of the United States Court of Chicago is

reversed and the case is remanded for a new trial.

THE COURT, THE 2ND AND 3RD
JULY 1937, 1937, 1937

United States Court of Appeals for the Seventh Circuit

44141

FRANK ANDERSON,

Appellant,

v.

THELMA SMITH,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

3321.A. 140

256

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On December 5, 1946 Frank Anderson filed a statement of claim in the Municipal Court of Chicago, alleging that he is entitled to possession of the apartment on the second floor at 4325 Vincennes Avenue, Chicago, and that Thelma Smith unlawfully withholds possession thereof from him. The case was tried before the court without a jury on December 11, 1946, resulting in a finding and judgment against defendant. The court further ordered that the writ of restitution be stayed until March 3, 1947. On March 5, 1947 defendant moved for an "extension of time."

The record shows that on March 26, 1947 a "motion for a new trial" was sustained; that thereupon the cause came on for trial before the court without a jury; that the court heard the evidence and the arguments of counsel; that the court was fully advised in the premises; and that it found defendant "not guilty" and entered judgment against plaintiff. Thereafter, the court denied plaintiff's motion to vacate the orders and judgment entered on motion of defendant. This appeal followed. Defendant (appellee) has not filed an appearance or briefs in this court.

The judgment of December 18, 1946 was final and there was no appeal therefrom. There was no attempt to invoke the jurisdiction of the trial court under Sec. 21 of the Municipal Court Act, (Sec. 376, Ch. 37, Ill. Rev. Stat. 1945.) The court

erred in vacating the judgment in favor of plaintiff and also in refusing to vacate the judgment in favor of defendant. Therefore, the order of the Municipal Court of Chicago entered on March 5, 1947 is reversed, and the judgment and orders of March 26, 1947 and March 28, 1947 are reversed, and the cause is remanded with directions to reinstate the judgment of December 18, 1946, which judgment is affirmed.

CERTAIN ORDERS AND A JUDGMENT
REVERSED AND JUDGMENT OF DECEMBER 18,
1946 REINSTATED AND AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR.

entered in vacating the judgment in favor of plaintiff and also in refusing to vacate the judgment in favor of defendant. Therefore, the order of the Municipal Court of Chicago entered on March 3, 1947 is reversed, and the judgment and orders of March 28, 1947 and March 29, 1947 are reversed, and the cause is remanded with directions to rehear the judgment of December 18, 1946, which judgment is affirmed.

WITNESSED MY HAND AND SEAL OF OFFICE
AT CHICAGO, ILLINOIS, THIS 10TH DAY OF MARCH, 1947.
JAMES M. KELLY, J. CLERK.

WITNESSED MY HAND AND SEAL OF OFFICE
AT CHICAGO, ILLINOIS, THIS 10TH DAY OF MARCH, 1947.
JAMES M. KELLY, J. CLERK.

62-141-188

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2.

Mildred N. Maloney also filed a counterclaim for separate maintenance against the plaintiff, David B. Maloney, in which she alleges that David B. Maloney is a resident of the Village of Lake-wood, and that she is a resident of Cook County in the State of Illinois; that her husband, David B. Maloney, refuses to live with her; that her husband is a practicing lawyer with an annual income in excess of Twenty Thousand Dollars, and also has valuable real and personal property. She prays that the plaintiff be compelled to make proper and suitable provision for her separate maintenance and support of their two children.

David B. Maloney filed an answer to the counterclaim in which he denied all charges of misconduct on his part which would cause his wife to live separate and apart from him.

The case was submitted to the Court without a jury, and after hearing the evidence of both parties, he dismissed the complaint for divorce for want of equity, and also dismissed the complaint for separate maintenance for want of equity. Both plaintiff and defendant have prosecuted appeals to this Court.

It appears from the record in this case that Mildred N. Maloney had, in the Circuit Court of Cook County, on Aug. 3, 1942, filed a complaint for separate maintenance against David B. Maloney, in which she alleges, "That it was impossible to live with her husband because he commenced a course of cruel and unusual conduct; that he has continuously harassed and worried the plaintiff, and made many threats of violence; that on many occasions he had beaten, struck and choked the plaintiff, and has caused her so much difficulty and grief, that it was impossible to live with him; that on several occasions, he has been guilty of extreme and repeated cruelty, as will more fully appear hereafter, and has created such a condition in the home, that

3.

the plaintiff and their children feared for their safety and peace of mind." The complaint alleges other facts and concludes with a prayer for separate maintenance and support money. To this complaint David B. Maloney filed an answer, and denied all charges of misconduct on his part, and also filed a counterclaim asking for a divorce from Mildred N. Maloney. The Court dismissed the complaint for separate maintenance, and the counterclaim for divorce. The decree was entered on Dec. 8, 1942.

It is claimed by David B. Maloney that the decree entered by the Circuit Court of Cook County, in the separate maintenance suit in which Mrs. Maloney failed to maintain a cause of action for separate maintenance against him, and the Court having dismissed said complaint for want of equity, is res judicata of all her charges set out in her counterclaim in the present case, and upon the question, whether up to that time, (Dec. 8, 1942,) she had been living separate and apart from the plaintiff without fault on her part; that any grounds that she might have for separate maintenance must have arisen after that date.

In the case of Hoffman vs. Hoffman, 316 Ill. 204, the same question was presented to our Supreme Court. In discussing the matter, the Court uses this language: "In order to support the decree for separate maintenance it is necessary that the complainant allege and prove first that she has a good cause for living separate and apart from her husband, and second that such living apart was without fault on her part. (Decker v. Decker, 279 Ill. 300; Johnson v. Johnson, 125 id. 510.) A hearing was had on the bill filed in February, 1922, on the charge of cruelty and misconduct toward her

4.

and a finding against her on that charge was made. That decree was binding upon her and was res judicata of all her charges of cruelty and misconduct toward her and upon the question whether up to that time she had been living separate and apart from plaintiff in error by reason of his fault. In effect it was a finding that she had left him without good cause." The same is true in this case.

Mrs. Maloney claims that she wrote a letter to Mr. Maloney requesting him to come and live with her, and therefore if conceding, that she might have been at fault in the first place, she, in good faith, offered to take him back, and resume the marital relations. the letter is as follows: "October 6, 1943. Dear David: Would it be at all possible for you to reconsider your statements made to Patsy, and Davey, and Judge Miner, and come back home and live with us again? People make mistakes in life for which they are sorry later. Reticence prevents their asking for an opportunity to right such a wrong. I am glad to extend to you the assurance of acceptance back into the family circle. I haven't seen my son Davey since July 3rd, 1943. I would appreciate having you bring him in to 910 Castlewood Terrace next Saturday, October 9th, at 10:00 A. M. and you may call for him Sunday at 5:30 P. M. Sincerely, your wife, Mildred."

Later, she wrote another letter. It is as follows: "October 14, 1943. Dear David: You did not bring Davey into Chicago last Saturday to visit with me as I asked you to do in my letter of October sixth; nor did you write or telephone. I waited at home all day Saturday hoping that Davey would arrive later. I should like to sew a flannel sport shirt for Davey but it has been so long since I saw him, and then only for two hours, that I do not know how large he is. Bring him in next Saturday, October 16th, at 10:30 A. M. and you may

5.

call for him Sunday at 5:00 P. M. Sincerely, your wife, Mildred."

In her testimony, she denies that her husband has a bona fide residence in the Village of Lakewood, but claims their home has always been in the City of Chicago. Both in her answer and counter-claim, she admits that her husband's residence was in Lakewood in the County of McHenry, and the letter on October 6, in no way offers to go to the home of her husband, but requests him to come and live with her at her residence. The second letter of October the 14th, makes no mention whatsoever, of living together, but requests the father to bring Davey, the son, to see her.

In the first separate maintenance suit, Mrs. Maloney charged her husband with beating, striking and choking her. These charges, no doubt were made public. Again we quote from Hoffman vs. Hoffman, supra. "After filing a bill against him charging him with cruelty, and in accordance with which it is but fair to infer she had testified, it would be abhorrent to say that merely because she came to the house an hour and a half after her bill had been dismissed and stated that she had come back to live with him, to see if they could get along together, he must take her back without any assurance whatever that she had made that offer in good faith, and the fact that she had never said that she was sorry for having caused him the humiliation brought about by her unsuccessful bill and testimony on the former hearing, all tend to rebut her statement on the witness stand that she in good faith desired to return to him." The same language applies with equal force to Mrs. Maloney in this case. There is no word in the whole testimony or record that shows that Mrs. Maloney was sorry for making the false charges of cruelty against her husband. The Court did not err in dismissing her bill for separate maintenance for want of equity.

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To sustain his complaint for divorce, David B. Maloney testified that he had maintained his home in the Village of Lakewood for several years prior to the time of filing his suit for a divorce; that his wife had left him without reasonable cause, and they had been living separate and apart continuously for several years last past; that he had maintained a good home for himself and his son, David; that his daughter, Patricia, then 13 years of age, had been living with her mother since the separation; that he had been paying them \$150.00 a month for their support, and that they were living in a house owned by him and his wife jointly. Mr. Charles W. Kromenaker, the father of Mrs. Maloney, was also called as a witness on behalf of the plaintiff, and described the home in which they were living with Mr. Maloney. He testified that his daughter would sometimes come to their home, and that she would probably stay a couple of hours.

Mrs. Maloney denied that she had deserted her husband, but claimed it was wholly on his account that they were not living together, as husband and wife; that Mr. Maloney sent word to her through the daughter, Patricia, for her not to come on the place again. Patricia Maloney was called as a witness, by the mother, and her testimony is very unreliable and unsatisfactory. Her testimony on direct examination, is entirely different from that on cross-examination. On direct examination, she states that the father told her to tell the mother never to come out to the house again, but on cross-examination she admits what the father states that he told her to say was that, "if she, meaning the mother, didn't behave herself, when she came out to the home, that he didn't want her to come." Under the evidence, as disclosed by the record in this case, we think that David B. Maloney

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was entitled to a divorce, and the Court erred in not granting him a divorce, as prayed in his petition.

In the complaint for divorce, Mr. Maloney states that there is property owned by himself and Mrs. Maloney, and that he is willing for the Court to make an equitable settlement of their property rights. The decree dismissing the complaint of Mildred N. Maloney for separate maintenance, is hereby affirmed. The decree dismissing the complaint of David B. Maloney for a divorce, is hereby reversed and the cause remanded to the Circuit Court of McHenry County with directions for the Court to enter a decree granting the said David B. Maloney a divorce, and to also adjust the property rights between the parties.

Affirmed in part, reversed
and remanded with directions.

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Abstract

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

A
332 I.A. 160

Gen. No. 9521

Agenda No. 1

Alan Jay Parrish, et al.,
doing business under the
firm name of Paris Mfg.
Co.,

Plaintiffs-Appellants,

vs.

The Pennsylvania Railroad
Company,
Defendant-Appellee.

2983
Appeal from the

Circuit Court of

Edgar County, Illinois

Wheat, R.J.

Plaintiffs-Appellants, doing business as Paris Mfg. Co., brought this action against Defendant-Appellee, The Pennsylvania Railroad Company, to enjoin such railroad from leasing certain premises used as a freight station, to a private individual, and to compel such railroad to reopen and operate its freight station and freight shipping facilities and for the recovery of damages. Following a hearing on the merits, the Circuit Court dismissed the action for want of equity, from which ruling this appeal follows.

The complaint, as amended, substantially charges that the defendant, for many years, had been engaged in operating a railroad to and from the City of Paris, Illinois; that in the conduct and operation of such railroad, the latter maintained and operated certain freight facilities consisting of a brick freight station building, loading

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TO THE HONORABLE MEMBERS OF THE HOUSE OF REPRESENTATIVES

1897

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE HOUSE OF REPRESENTATIVES

APRIL 1, 1897

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platform, loading ramp, team-track facilities, and a switch-track for the use of plaintiffs and other patrons of the railroad and the public generally; that on March 13, 1905, the Commercial Club of the City of Paris, executed and delivered to the Vandalia Railroad Company, the predecessor in title of defendant, certain premises including Lot 69 in Commercial Club Addition, with the provision that such property should be used for railroad purposes; that such company constructed a freight depot consisting of a brick building, a loading platform, and a loading ramp, on such premises, which was thereafter used for railroad purposes until about March 20, 1944; that after March 13, 1905, such company or its successors and lessees constructed a switch or spur-track on Lot 69 and along the south side thereof, which crossed U. S. Route 1, or Main Street, in the City of Paris, and connected with the main track of the railroad at a point east of Main Street and which switch or spur-track was thereafter used in the handling of freight shipments of plaintiffs and the public generally and was located immediately north of and adjacent to the plant and property of plaintiffs and was particularly suitable to the convenience and use of plaintiffs; that on March 20, 1944, the defendant leased to one Art Risser, trading as Art Risser Lumber and Mfg. Co., said freight depot building, the land upon which same was located, and land adjacent thereto, of an area of 23,400 square feet, and 450 feet of track lying northeast of said freight building; that such purported lease provided that it was to become effective on March 16, 1944, and was to run for a period of not longer than five years in consideration of an annual rental of \$300; that such property was

so leased by the defendant without first obtaining the consent and approval of the Illinois Commerce Commission, in violation of Section 27(c) of Chapter 111 2/3 of Illinois Revised Statutes 1943; that the premises described in such lease were to be used by the lessee for manufacturing purposes; that subsequent to April 9, 1945, and before the commencement of this action, the defendant tore up, dismantled, and removed the spur and switch-track aforesaid against the objection and protests of the plaintiffs, and without first obtaining the consent and approval of the Illinois Commerce Commission, in violation of Section 49-A of Chapter 111 2/3, Illinois Revised Statutes 1943; that such acts also violated General Order No. 27, as amended, of the Illinois Commerce Commission; that prior to the commencement of this action, the defendant moved its freight depot from the brick freight station building aforesaid to its passenger station building and depot on the north side of the main track of such railroad and discontinued the freight station services and facilities theretofore maintained at the brick station house located on said Lot 69, in violation of General Order No. 117 of the Illinois Commerce Commission, in that said defendant failed to make any application or receive the consent of such Commission so to do and failed and neglected to give notice of such action as required by such Order; that since April 9, 1945, and prior to the commencement of this action, the defendant has permitted and allowed said Art Risser to commence the erection of an addition to the brick freight building and a new addition upon the area described in the lease and extending beyond such area onto that part of Lot 69 upon which was theretofore maintained and located the said spur and switch-track,

against the objection of plaintiffs, and defendant has dismantled and removed the spur-track and freight facilities offered thereby, in violation of Section 27(c) and 49-A, Chapter 111 2/3, Illinois Revised Statutes 1943; that before and since the execution of the purported lease, the defendant has permitted and allowed the loading platform and loading ramp to become in a state of disrepair and has permitted and allowed said Art Risser to dismantle the same in whole or in part, over the objections of the plaintiffs; that prior to the commencement of this action, the defendant has disposed of and encumbered certain of its property otherwise than by assignment, transfer, lease, mortgage, and sale, in that it has permitted said Art Risser to extend the building proposed to be erected by him and in course of construction by him upon that part of the premises upon which the railroad theretofore operated the spur and switch-track on the south side of said Lot 69, which was not included in such lease, in violation of said Section 27(c); that by its acts, the defendant has failed to furnish service and facilities so as to promote the safety, health, comfort, or convenience of its patrons, including the plaintiffs, or in such manner so as to be in all respects adequate, efficient, just, and reasonable, in violation of said Section 27(c), and, in consequence, has endangered the safety, health, comfort, and convenience of plaintiffs and other patrons in that they have been obliged to load and unload freight by hoists, channel irons, and other dangerous and difficult methods, and have been obliged to have shipments switched and transferred to the New York Central Railroad Company at great delay and inconvenience; that the defendant is threatening to permit said Art Risser to erect a building

within fourteen feet of valuable improvements and buildings of the plaintiffs adjoining the premises of said railroad, which proposed building is planned to be of such nature, location, and type of construction as to constitute a serious fire hazard to the property of plaintiffs, thus materially increasing the insurance costs of plaintiffs and depreciating the value and use of such property; that because of the defendant's acts, the plaintiffs had been required to transport heavy drilling machines for shipment across and through the City of Paris to the railroad of the New York Central Railroad Company, located a mile or more away from plaintiffs' plant, at great expense, trouble, danger, and inconvenience to plaintiffs, in the sum of \$2,000; that defendant is threatening to close or permit to be closed a public-way or alley running north and south between said Lot 69 and a public street running east and west immediately south of said Lot 69, so as to create a cul-de-sac and which public-way and alley has, for thirty years or more, been open and used by plaintiffs and the owners of other lots in said Addition and other patrons of the defendant and the public generally as a way and means of travel to and from the freight depot of said railroad, over and across said Lot 69 to the team-track facilities, spur-track, and loading ramp and platform, theretofore maintained upon said Lot 69, and across such lot to and from Central Avenue and Main Street, to the detriment, danger, and inconvenience of plaintiffs and the public generally; that plaintiffs and their predecessors in title acquired land on which their plant is located adjoining said Lot 69 and erected such factory building in reliance

upon representations that a freight depot building would be erected on Lot 69 and that such freight facilities would be installed and maintained; that plaintiffs have recently built and erected valuable additions to their plant especially planned and laid out with the view to affording plaintiffs saner and more convenient use of and access to said freight facilities of the defendant. The prayer of said complaint requested an injunction restraining the defendant and its lessee from erecting and constructing the building above mentioned and from abandoning the freight depot building and other freight facilities above mentioned and from permitting the use of said freight depot building for other than railroad purposes; that defendant be enjoined from leasing such property without first obtaining the consent and approval of the Illinois Commerce Commission; that the defendant be enjoined from closing said public-way or alley. It further prayed for a mandatory injunction directing the defendant to restore the said freight facilities, including the reopening and maintaining of the freight station building. Damages are requested in the sum of \$2,000.

Defendant's answer denies that the plaintiffs have reasonably used the spur-track in the handling of freight shipments within recent years; avers that the present track facilities are adequate; that freight facilities are now located diagonally across from the present plant of plaintiffs; denies that the lease is invalid and that there was any violation of Section 27(c) of said Chapter 111 2/3; denies that the removal of the track was in violation of Section 49-A of the Utilities Act; avers that for a long period of time

insufficient use had been made of such track by plaintiffs or others to warrant the continued maintenance of the same; states that whether or not it was necessary, under the circumstances, to secure the approval of the Illinois Commerce Commission was a question within the jurisdiction of such Commission and that a proceeding is now pending before the Commission to determine that question and the others involved in this action; it admits the leasing of the premises to Art Risser but denies any violation of the Public Utilities Act, and alleges the lease to be valid; it admits the allegations concerning the erection of an addition to the brick building and a new addition upon the area described in the lease and the allegations concerning the removal of the spur-track and the freight facilities afforded thereby, but denies any violation of Section 49-A of the Illinois Public Utilities Act; admits that it had intended to lease the additional area of land formerly occupied by said track to said Art Risser, after first obtaining the consent and approval of the Commission; alleges that a new loading platform and ramp were constructed prior to the filing of this complaint, easterly of Main Street and southerly of the main track, the same having been constructed diagonally across from the plaintiffs' premises, and that such facilities are adequate to serve plaintiffs and other shippers; denies any violation of the Illinois Public Utilities Act or any General Order issued by virtue thereof; and denies that plaintiffs are entitled to any damages.

It is necessary for the court to consider, first, whether all persons possessing a substantial legal or beneficial interest in the subject matter of the litigation, and who would be affected by the decree, have been made parties.

The record shows that the lessee of the railroad, Art Risser, has been occupying the freight station, in the business of selling lumber and building materials and the manufacturing of hog houses, flat racks, and brooder houses, and planned to continue such business at that location, and had received a building permit and had started construction on an adjoining building, substantially as charged in the complaint. It is apparent that if plaintiffs obtained the relief sought by the complaint, the interests of said Art Risser would be materially affected. Plaintiffs seek to have his lease held void, the spur-track restored across the premises on which his new building was to be constructed, and to dispossess him from the freight depot. In other words, he would be practically out of business at that location. In the opinion of this court, said Art Risser was a necessary party defendant. Although it does not appear that this subject was brought to the attention of the trial court and no cross-assignment of error appears in Appellee's brief, such brief does comment on the absence of Risser as a party defendant. The duty of this court, under such circumstances, is clearly detailed in the case of Texas Company vs. Hollingsworth, 375 Ill. 536, at 543, in which opinion the following appears:

"The general equitable rule is that all persons possessing a substantial legal or beneficial interest in the subject matter of litigation and who will be affected by the decree must be made parties. (Riley v. Webb, 272 Ill. 537; McCreery v. Bartholf, 305 id. 325; Cowles v. Morris & Co., 330 id. 11.) When all the parties are before the court the whole case may be considered and all interests protected and the

court is then enabled to make a complete decree binding on all parties who have a substantial beneficial interest in the subject matter of the litigation and thereby dispose of the whole complaint. Atkin v. Billings, 72 Ill. 597; McMechan v. Yenter, 301 id. 508.

"If the lack of parties is brought to the attention of the court, be it one of original or appellate jurisdiction, the court should not proceed further in the matter until the omission has been corrected even though no objection is made by any party litigant. (Gerard v. Bates, 124 Ill. 150; Abernathie v. Rich, 229 id. 412.) The general rule of equity pleading requiring that all persons should be made parties who are legally or beneficially interested in the subject matter and result of the suit so that a complete decree may be made between them applies to an action for injunctive relief. (Knopf v. First Nat. Bank, 173 Ill. 331; McMechan v. Yenter, supra.) When the omission of necessary parties is noted the ordinary procedure is for the court to stop further proceedings. McMechan v. Yenter, supra.

"From the facts appearing on the face of the complaint and petition it is apparent that there are persons who have an interest in the lease and in keeping the oil wells in operation that were not before the court. In this condition of the record we are not privileged to give consideration to the reasons urged in support of the motion to dismiss the petition nor pass upon the merits of the petition.

The chancellor erred in undertaking to pass upon the motion to strike the petition and in dismissing the complaint for want of equity. The whole proceeding should have been stayed until the parties interested were before the court. * * * .

"The judgment of the Appellate Court and the decree of the circuit court are reversed and the cause is remanded to the circuit court of Marion County, with directions to grant plaintiff leave to make all interested persons parties to the proceedings and to stay all action in the case until all persons having an interest are before the court, and that if plaintiff does not take such action within a reasonable time the complaint and petition be dismissed at its costs."

It appearing, therefore, that all necessary parties are not before the court, the decree of the Circuit Court is reversed and the cause is remanded with directions to grant plaintiffs leave to make all interested persons parties to the proceeding and to stay all action in the case until all persons having an interest are before the court, and that if plaintiffs do not take such action within a reasonable time the complaint be dismissed at plaintiffs' costs. The costs in this appeal are assessed against Appellants.

Reversed and remanded
with directions.

How Burton

Yours

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Abstract

GEN. NO. 10096

AGENDA NO. 2

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS

— 3321A.100² —
SECOND DISTRICT

FEBRUARY TERM, A. D. 1947.

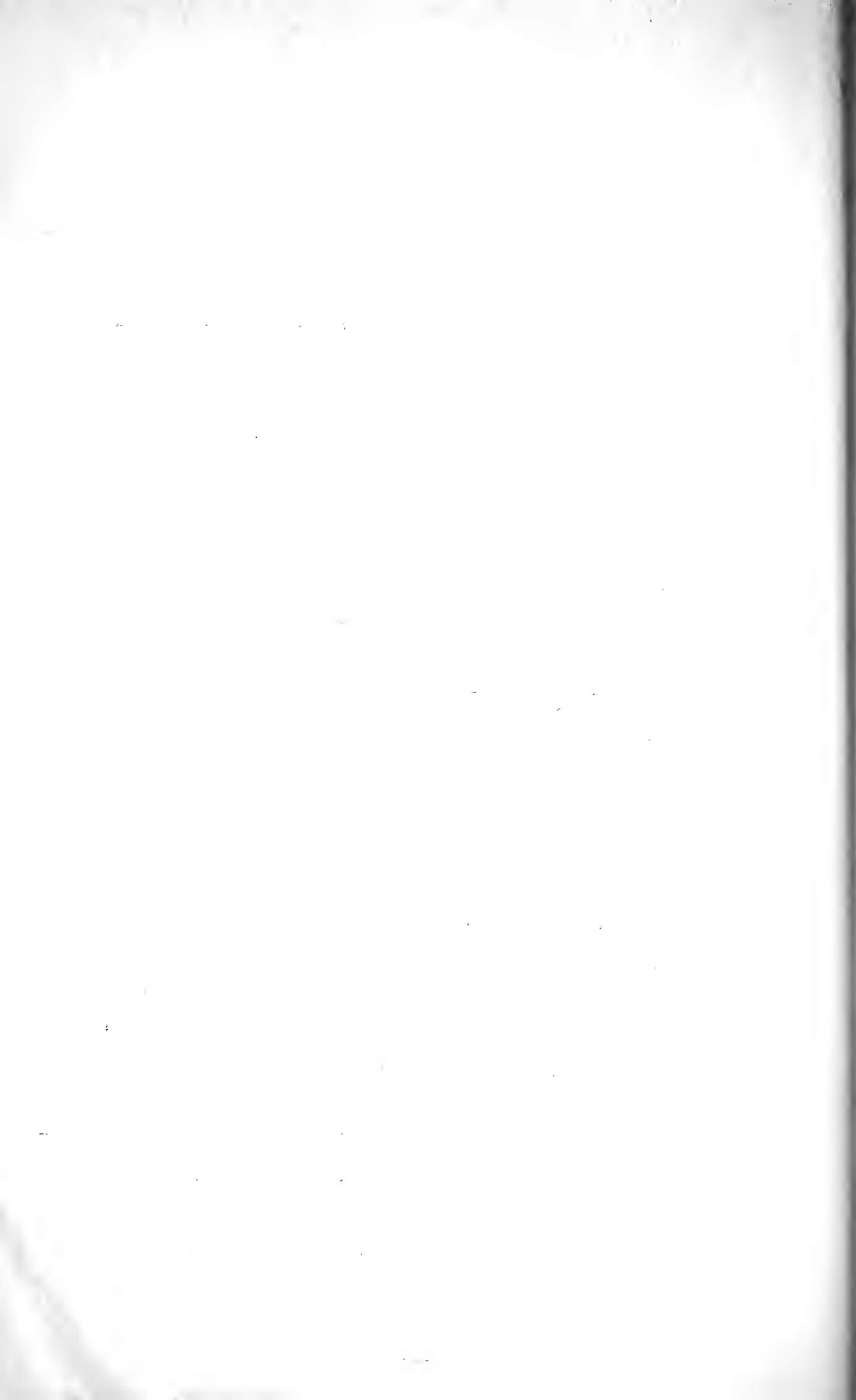
MARJORIE KESICH,
APPELLEE
V.
MICHAEL KESICH,
APPELLANT

APPEAL FROM THE
CIRCUIT COURT OF
WILL COUNTY

Dove, J.

The circuit court of Will County entered a decree for appellee, the wife of appellant, granting her separate maintenance, the custody of their two children aged about five and two years respectively, and suit money and alimony of \$20.00 per week. The husband has appealed from the decree.

The parties were married on August 3, 1940. Appellee is a Roman Catholic and appellant is a member of the Serbian Orthodox Church. When they were married, they went to live with appellee's mother, a widow, in her ten room residence in the City of Joliet, where appellee's older sister and her husband and two children also resided. They separated on April 11, 1945, and a few days later appellee filed a suit for divorce in the circuit court of Will County. It appears that she was not



able to obtain the consent of the proper officials of her church to the maintenance by her of the suit for divorce, and she dismissed the same, and on June 13, 1945, instituted the suit for separate maintenance involved in this appeal.

At the trial the chancellor held that the first and probably the worst mistake the parties made was when they moved into the family home with appellee's mother and her other sister and her family. Being of different religious faiths, little differences grew into constant quarrels and bickerings. Appellee and her sister claim that appellant accused them of slipping away soon after the second child was born and having it baptized in their faith without his knowledge or consent and that he slapped appellee. They denied the accusation and he denied slapping his wife.

About one year after they were married, appellant offered to buy a home for \$8000.00 and to borrow about \$1500.00 as a down payment, but appellee refused to enter into the arrangement on the ground that with the other necessary expenses, the project was too large for them. Appellant testified that appellee was ruled by her mother, who, with the other sister, stepped in and said "no" to the proposed purchase.

Appellee wrote appellant a note and left it on his desk, as follows: "Mike: If you want anything for your lunch you can get it yourself and fix it in the morning. You can also get your own breakfast. If you want any washing or ironing done from now on you can get it done by somebody else. I am through. Marjorie". The note bears date of "Mar. 15, 1946," but appellee testified that the date was not written by her, and that she never "went through" with the note, but "got him everything he wanted" and



this testimony is not disputed. Appellant admits writing the date. When the parties separated they attempted to divide their assets. In the division she received \$200.00 from the cash in bank, and defense bonds of the face value of \$375.00, all of which she testified is now spent. She also received \$120.00 additional cash which was in her name but not divided between them.

Testimony for appellee that appellant was seen with another woman in his car, and that on occasions he stayed out late, boils down to a "sharing the ride" agreement, during the strenuous shortage of transportation during World War II; that he was out late on several occasions at union labor meetings; and there is neither allegation nor proof which justifies any insinuation of adultery as made in appellee's brief.

We agree with the holding of the chancellor that the parties separated by mutual consent and that they agreed that they were going to separate and get a divorce. Whether the suggestion came from appellant or from appellee is immaterial as appellee acquiesced in it. The testimony fairly shows that her failure to prosecute the divorce suit was because of the rule of her church, a most worthy canon of that institution. Among the things that occurred between the parties, there was none so serious that it could not be adjusted, if an effort in good faith to do so was made.

Appellee was in appellant's room while he was packing his grip. The testimony as to what was said between them there is not in exact harmony, but the chancellor saw and heard the witnesses and is in a better position to judge its credibility than this court and his findings will not be disturbed unless



the evidence clearly preponderates against it. The evidence shows that on several occasions since this litigation started, appellee has importuned appellant for a reconciliation, offering to go to him and live with him again, and in court she testified she ~~was~~ is still willing to live with him if he will procure a home for her and the children. Appellant has not made, so far as the record shows, any overture to his wife for her return, and testified on the trial that he does not want to live with her under the circumstances, and gave it as his opinion that appellee does not mean it when she says she wants to go back to him. There is nothing in the record that justifies such a conclusion.

As the record stands, the equities are with appellee, and the court correctly entered a decree against appellant. Where the husband refuses to take the wife back and provide her with a home after she left him, the wife is considered as living separate and apart without fault on her part, entitling her to separate maintenance, notwithstanding the original separation may not have been warranted. (Thomas v. Thomas 152 Ill. 577; Haley v. Haley, 209 Ill. App. 153.)

The fact that the complaint was faulty, and some of the affirmative defenses in the answer were not replied to, where the cause was tried as if none of these defects existed, amounts to a waiver of the defect, if any, and the matter cannot be raised on appeal. (Guerin v. Guerin, 270 Ill. 239, 244; Druce v. Druce, 313 Ill. App. 169; Meyer v. Hendrix, 311 Ill. App. 605).

The decree is sustained by the evidence and is affirmed.

Decree affirmed.

Case 2973

Abstract

A

Gen. No. 10102

In The

Agenda No. 24

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1946

332 Del. 1946
Case 2973
1947

BENJAMIN A. SCHMAHL and
MARY ELETHA SCHMAHL,

Plaintiffs and Appellees,

vs

CHARLES R. ACKERSON,

Defendant and Appellant.

Appeal from

Circuit Court

Lee County

Hon. George C. Dixon,
Trial Judge

332 I.A. 278

BRISTOW, J.

The parties to this action owned land that was adjoining, the plaintiffs owning the dominant estate and the defendant the servient estate. The plaintiffs filed their chancery action in the Circuit Court of Lee County charging the defendant with creating a dam and obstructing the natural flow of water and causing damage to his crops. He prayed for injunctive relief and for damages. The trial court entered a decree allowing plaintiffs' prayer for injunction and allowed one dollar in damages. This appeal followed.

The defendant in his first answer admitted all of the allegations of the complaint, but sought to justify the same by alleging that the plaintiffs were using the tile "as mere licensees," and claimed that the plaintiffs were casting waters upon the defendant's land in larger quantities than that which flowed in a state of nature. This answer was later withdrawn and an amended answer was filed which denied all allegations of the complaint. At this time there was also filed a counterclaim which was later withdrawn and need not be considered.

The evidence on behalf of the plaintiffs indicated that there was a natural water course travelling westward across the lands of the plaintiffs-defendant. The defendants in their brief do not question the right of the plaintiff to drain water from their lands into such natural water course. "Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the same into any natural water course or into any natural depression, whereby the water will be carried into some natural water course, or into some drain on the public highway with consent of the commissioners thereto." Jones Ill. Stat. Ann. Vol. 9, p. 272, No. 42,149; Mauvaistere Dist. v. Wabash Ry. Co., 299 Ill. 299, 307; Peck v. Harrington, 109 Ill. 611.

One of the defendants, Benjamin A. Schmahl, testified that he had resided on his farm for twenty years, and that the Ackermans had lived on the adjacent farm for twenty-two years, ; that there had been a tile ditch running westerly across the two farms since 1910; that at the fence line there had been deliberately constructed by the appellant a dam or embankment about twenty inches high which obstructed the flow of the water from his land across that of the appellant; that he saw the appellant shoveling dirt with a spade; and that the obstruction was not a natural result of tilling the soil. This appellee further testified that he first discovered the tile blocked about eighteen years previously; that he again discovered such a condition eight years ago and again four years ago; that Donald Ackerson, the appellant's son, who has been a tenant on appellant's farm, told appellee to never disturb the tile again or he would be "poked in the face." Donald did not see fit to deny this testimony. It further appears from the appellees' version of the situation, that after ~~the~~ the appellant had repeatedly blocked the tile and created the dam that he dug a ditch down

the swale to facilitate drainage. Several witnesses testified on behalf of plaintiff corroborating his recital of grievances. It further appeared that because of Ackermans' interference, the Schmahls suffered crop damage.

Besides the Ackermans, who took the stand and denied the charges made against the, there were several witnesses who were sent to the premises about a week prior to the trial ~~xxx~~ who testified that although there was a ridge of dirt along the fence line separating the two tracts of land, that such a condition appeared to be due to a course of plowing in the direction of the fence and an innocent result of the natural cultivation of the soil. There were a few witnesses ~~who~~ who said they had, at harvest time, made a most casual observation of the dam, but they thought it was the result of the normal use of the land in the course of good husbandry.

The principal argument made by the appellant in his brief is that the trial court erred in admitting into evidence the original unsworn answer of the appellant which admitted that he did obstruct the tile and create the dam. An attorney for the appellant testified that he had written the answer under a misapprehension of facts. The appellant did not see fit to make such explanation when he was on the stand. Without passing upon the propriety of this ruling, this court is of the opinion that there was sufficient evidence adduced on behalf of the appellees to justify the conclusion reached, without giving consideration to the alleged admissions made by Ackerman in his original answer. The findings of a chancellor will not be reversed unless clearly against the weight of the evidence. Flym v Troesch, 373 Ill. 275; Dalby v Hayes, 267 Ill. 521.

We believe the law and the evidence abundantly support the decree entered and warrant its affirmance.

JUDGMENT AFFIRMED

1. The first part of the report is a general introduction to the subject.

2. The second part is a detailed description of the methods used in the study.

3. The third part is a discussion of the results of the study.

4. The fourth part is a conclusion and a list of references.

5. The fifth part is a list of figures and tables.

6. The sixth part is a list of abbreviations and symbols.

7. The seventh part is a list of footnotes.

8. The eighth part is a list of appendices.

9. The ninth part is a list of references.

10. The tenth part is a list of figures and tables.

11. The eleventh part is a list of abbreviations and symbols.

12. The twelfth part is a list of footnotes.

13. The thirteenth part is a list of appendices.

14. The fourteenth part is a list of references.

15. The fifteenth part is a list of figures and tables.

16. The sixteenth part is a list of abbreviations and symbols.

17. The seventeenth part is a list of footnotes.

18. The eighteenth part is a list of appendices.

19. The nineteenth part is a list of references.

20. The twentieth part is a list of figures and tables.

21. The twenty-first part is a list of abbreviations and symbols.

22. The twenty-second part is a list of footnotes.

23. The twenty-third part is a list of appendices.

24. The twenty-fourth part is a list of references.

25. The twenty-fifth part is a list of figures and tables.

26. The twenty-sixth part is a list of abbreviations and symbols.

27. The twenty-seventh part is a list of footnotes.

28. The twenty-eighth part is a list of appendices.

29. The twenty-ninth part is a list of references.

30. The thirtieth part is a list of figures and tables.

31. The thirty-first part is a list of abbreviations and symbols.

32. The thirty-second part is a list of footnotes.

33. The thirty-third part is a list of appendices.

34. The thirty-fourth part is a list of references.

35. The thirty-fifth part is a list of figures and tables.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM
A. D., 1947

Term No. 47M4

CHARLES L. WEISBRODT and LENA
WEISBRODT,

Plaintiffs-and-Appellees,

-vs-

LOUIE NORRIS and CLINE NORRIS,

Defendants-and-Appellants,

-and-

CHARLES BOWMAN and V. E. TURNER,

Defendants.

332 I.A. 279

Appeal from the
Circuit Court of
Williamson County.

SMITH, J.

This is an appeal by Louie Norris and Cline Norris, defendants-appellants, from a decree of the Circuit Court of Williamson County in favor of Charles L. Weisbrodt and Lena Weisbrodt, plaintiffs-appellees, and from certain orders entered by the trial court prior to decree. It was determined that Charles Bowman and V. E. Turner, who were joined as defendants, were not proper parties.

The plaintiffs owned certain mining lands, which were leased to the defendants. The lease contained the usual provisions and provided that the defendants pay a royalty of 10¢ per ton for all coal mined and that the defendants have the right to terminate the lease at any time they ascertained that coal could not be mined by them with commercial profit and also that 30 days notice should be given to the plaintiffs of their intention to terminate the lease. The 10th clause

of the lease, which is the basis of this litigation, provided as follows: "It is further hereby understood and agreed that no machinery or mine equipment may be removed from said premises until, in the opinion of both parties hereto, parties of first part and parties of second part, that coal cannot be mined and sold at commercial profit to parties of the second part, and it is also hereby understood and agreed that at the time of the abandonment of said lease or at the termination hereof, no machinery or mine equipment shall be removed from said premises until all royalty due hereunder shall have been paid in full." On January 7, 1946, the defendants gave notice of their intention to terminate the lease.

The plaintiffs filed a suit for injunction and specific performance of the lease, alleging that if the defendants removed their mining machinery that they would lose royalty and be irreparably damaged. The complaint contained a prayer for an injunction and for specific performance and also a prayer for general relief. A temporary injunction was issued without notice and without bond. The defendants filed an answer to the complaint and a motion to dissolve the injunction and dismiss the complaint. The defendants' answer admitted that they had commenced the removal of mining machinery, denied that there was any coal remaining which could be profitably mined and further alleged that the quantity of unmined coal could be definitely determined by survey and that the damage to the plaintiffs, if any, could be definitely computed. The defendants' motion to dismiss alleged that the plaintiffs had an adequate remedy at law and that the nature of the contract for which specific performance was sought by the plaintiffs was such that the same could not be compelled by the court and that the injunction should be dissolved.

On the day set for hearing both parties answered ready for trial and the case proceeded to hearing with the defendants assuming the burden of proof concerning their motion to dissolve the injunction. Evidence was introduced by both parties which related primarily to the question of, whether or not, the operation of the mine could be profitably continued by the defendants. At the close of the evidence January 29, 1946, the court reserved his decision until February 4, 1946, at which time he rendered an oral decision, as reflected in the written decree filed later, in which he found that a permanent injunction should be denied and suggested to plaintiffs that they amend their original complaint to conform to the evidence in regard to damage sustained by them due to the defendants' breach of the terms of the lease. The plaintiffs on February 8, 1946, filed an amendment to their original complaint which was called Count II, and which contained a prayer for damages in equity. On February 27, 1946, the defendants filed an answer to plaintiffs' amended complaint again asserting that the remaining coal could not be profitably mined; that the defendants had not been guilty of any breach of their contract with the plaintiffs and demanding a trial by jury on said Count II. On the same day the defendants filed a motion for a trial by jury upon the issues presented by Count II, which alleged that it was a law count and that the burden of proof had been upon the defendants at the hearing to dissolve the injunction but that the burden of proof as to Count I¹ was upon the plaintiffs to show a breach of contract and resulting damages. On May 7, 1946, the motion for jury trial was overruled by the court and the cause was continued for submission of a written decree, which was entered September 4, 1946. On October 4, 1946, the court

vacated this decree on the plaintiffs' motion and the final decree dissolving the injunction and awarding the plaintiffs damages in the sum of \$1,200.00, was entered October 18, 1946. The decree also found that a permanent injunction and specific performance of the negative covenant in the lease would have been proper equitable relief but that money damages would serve the plaintiffs as well and would work less hardship on the defendants.

The errors relied upon for reversal by the defendants are in substance: (1) that the court erred in finding that a permanent injunction and specific performance of the negative covenant of the lease would have been proper equitable relief and in awarding money damages in lieu thereof; (2) that the court erred in overruling the defendants' motion for a jury trial as to Count II; and (3) that the court erred in suggesting to the plaintiffs that they file an amendment to their complaint asking for money damages and in passing upon the question of damages without allowing defendants to offer evidence upon said question.

The evidence shows that there was a complete hearing upon the merits of the matter in controversy. It is clear from the evidence offered by both parties, that there was a quantity of coal remaining which could have been profitably mined by the defendants. The findings of the court as to the amount of coal and amount of damages suffered by the plaintiffs is in our opinion amply supported by the evidence. There is no dispute as to the facts of the case and as stated in the defendants' brief, the question is purely one of law and procedure.

The only questions before this court are, was it proper for the court to exercise equity jurisdiction over the facts



and circumstances of this case and, if this question is answered in the affirmative, was it proper for the court to deny a permanent injunction and refuse to require specific performance of the terms of the lease and in lieu thereof, to grant damages as an incident to the equitable relief.

We are of the opinion that the court properly exercised its equity powers in granting the temporary injunction. Had the court refused to intervene in this case the ventilating equipment and other machinery would have been removed before it would have been possible for the parties to conduct the surveys, which were made in the mine subsequent to January 7, 1946, and which provided much of the testimony which was adduced at the trial. It was essential for the court to have full knowledge of the amount of coal still underlying the surface and the conditions which existed concerning whether, or not, it could be profitably mined by the defendants. In the case of *Winhold v. Finch*, 286 Ill. 614, p. 619, the court said, "When an owner of property is about to be deprived of a legal right in connection with it by the wrongful act of another for which there is no legal redress the act may be restrained by injunction..... The irreparable injury necessary to give a court of equity jurisdiction in such a case is not one so great as to be impossible of compensation, but one of such a character that the law cannot give adequate compensation for it." In the case at bar it was necessary for equity to intervene to retain the status quo of the mining property until the facts of the case could be investigated.

The court having acquired jurisdiction of the case, it was proper for it to hear the case on its merits and to award damages as an incident to the equitable relief. In 19 *American Jurisprudence*, pages 126-128, the rule is announced as

follows: "equity will not enter a partial or incomplete decree. Having taken cognizance of a cause for any purpose, a court of equity will ordinarily retain jurisdiction for all purposes; decide all issues which are involved by the subject matter of the dispute between the litigants; award relief which is complete and finally disposes of the litigation so as to make performance of the court's decree perfectly safe to those who may be compelled to obey it; accomplish full justice between the parties litigant; and prevent future litigation." In the case of *Stickney et al., v. Goudy*, 132 Ill. 213, p. 227, the court said: "It may be conceded that a bill in equity could not be maintained where the bill was brought merely for the purpose of recovering damages for the breach of a contract; but while this is true, it does not follow that a court of equity will in no case decree compensatory damages. Where a court of equity obtains jurisdiction in a cause for one purpose, it may retain it for all purposes. In speaking on this subject, Pomeroy (Vol. 1, sec. 181,) says: "When a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters at issue. For this reason, if the controversy contains any equitable feature, or requires any purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal rights, and grant legal remedies which would otherwise be beyond the scope of its authority".

We are of the opinion that the trial court exercised sound discretion in refusing to require specific performance

of the lease between the plaintiffs and defendants, because of the difficulties involved in enforcing such a decree. Under the circumstances of this case the interest of both the plaintiffs and defendants were best served by granting compensatory damages to the plaintiffs.

The defendants place much emphasis upon the fact that they were denied a jury trial as to Count II, of the amended complaint. They insist that this was a law count. The record of the trial does not support this contention. Count II was also in equity as is shown by the prayer for relief and the manner in which it was considered by the court. The court did not transfer this count to the law docket, but elected to do complete justice between the parties litigant in equity. If the defendants had desired that the matter be heard by a jury they should have filed their jury demand when they made their first appearance. (Section 188, Chap. 110, Ill. Rev. Statutes 1945.)

The defendants also contend that the court erred in suggesting that the plaintiffs file an amendment to their complaint, asking for money damages and in passing upon the question of damages, without permitting the defendants to offer further evidence. The court had heard the case on its merits and both parties had rested. In our opinion it was entirely proper for the court, in accomplishing complete justice between the parties litigant, to suggest that this amendment be made and to render a decree without hearing further evidence.

For the reasons stated the judgment of the Circuit Court is affirmed.

Affirmed.

BARTLEY, P. J. and CULBERTSON, J. concur.

To be published in abstract only.

Clem Smith, Judge.

FILED
SEP 5 1947
Stanley B. Brown
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM
A. D. 1947

Term No. 47M17

332 I.A. 279²

RUBY HAMILTON,)	Appeal from the
Petitioner-Appellant,)	Circuit Court of
-vs-)	Madison County, Illinois.
VIOLA SOURJOHN,)	
Respondent-Appellee.)	

Smith, J.

This is an appeal from a judgment of the Circuit Court of Madison County dismissing a writ of habeas corpus instituted by Ruby Hamilton, petitioner-appellant, against Viola Sourjohn, respondent-appellee, for the custody of Charles R. VanZandt, a male child 10 years of age. On trial of the case before the court, without a jury, the court found that the child was lawfully in the custody of the respondent, his paternal grandmother.

The evidence disclosed that petitioner, the mother of the child, was married December 28th, 1935, to Philbric VanZandt, when she was 16 years of age. Shortly after their marriage they occupied a small house at Webber's Falls, Oklahoma, which belonged to the respondent and her husband, where the petitioner's husband engaged in farming. At this time the respondent's husband, Silk Sourjohn, was employed at a nearby town of Braggs, Oklahoma. Philbric VanZandt, the petitioner's husband at this time, was the child of a former marriage of the respondent. During the time the petitioner

and her husband, Philbric VanZandt, lived at Webber's Falls there was some conflict in the testimony as to whether the respondent spent most of her time with them or with her husband in Braggs. It was during this period that the child in question, Charles R. VanZandt, was born on May 8th, 1937, to the petitioner and Philbric VanZandt. There was also conflict in the testimony as to just how much care the respondent gave Charles but according to her testimony she took complete charge of him from birth and reared him in her own home from the age of three months and the petitioner showed little interest in him. The petitioner denied that this was the case but admitted that she left her husband in July of 1939, and took her eleven months old daughter to the home of her father in Sallisaw, Oklahoma, some fifty miles distant. The petitioner stated that she left Charles because of the lack of means of transportation. Later that year the petitioner obtained a divorce in the District Court of Sequoyah County, Oklahoma, from her husband on the grounds of cruelty and the court found that both parties were proper persons to have the custody of the minor children and awarded the daughter to the petitioner and Charles to his father, Philbric VanZandt.

Following the divorce, petitioner resided with her father until in December 1942, when she married her present husband, Fred Hamilton. Two children were born of this marriage and they and the daughter by the previous marriage were residing with the petitioner at the time of the hearing. Charles continued to reside with his father, who was living with his mother, the respondent, until October of 1942, when he was inducted into the armed services, where he remained until July 1945. During this period and up until the time

of the hearing, Charles remained in the custody of the respondent, who, because of the itinerate nature of her husband's work, as a carpenter in the construction of army camps, resided successively in Arkansas and Missouri and finally moved to Granite City, Illinois, in 1942. The respondent, her husband and Charles had been living in a comfortable modern home on the outskirts of Granite City four and one-half years at the time of the hearing. The respondent took Charles to see the petitioner on several occasions but the petitioner did not visit Charles after she left her husband in 1939. On one occasion the respondent took Charles to see his mother, the petitioner, when she was in the hospital in Fort Smith, Arkansas, and it had been so long since she had seen the child that she did not recognize him. There was some evidence of correspondence between the petitioner and the respondent but very little considering the period of the separation. The petitioner made no contribution toward Charles' support and sent him practically nothing in the way of gifts. The father, Philbric, was shellshocked in the war and was unable to attend the hearing. He has remarried and now lives in St. Louis, Missouri.

In September of 1946, petitioner received a letter from the Veteran's Administration stating that an award had been made to respondent for the care of Charles and she went to the District Court of Sequoyah County, Oklahoma, and had the decree of divorce amended changing the custody of Charles from the father to herself. Notice of the proposed amendment was sent to Philbric VanZandt, the father of the child, in care of the respondent, but neither the child or the respondent were made parties to the proposed amendment. The petitioner was a resident of Fort Smith, Arkansas at the time this action

was taken. Subsequent to this action a proceeding was brought in the County Court of Madison County to have Charles declared a dependent and neglected child but the Court found he was not a dependent and neglected child.

The evidence further shows that the respondent and her husband are very attached to Charles; that they are financially able and desirous of providing a home for him and that they have provided well for him and have seen to his educational and religious training. Charles expressed a decided preference to remain in their custody and gave as his reason that the respondent has been good to him, that he loves her, as she is the only mother he has ever had, and that his mother, his step-father and their family are strangers to him. It also appears that the petitioner and her present husband are proper persons to be intrusted with the custody of the child and while their financial status is not quite so secure, they are able to provide for him. There is nothing in the evidence which shows any unfitness on the part of either party to provide a proper home for the child, they both own good homes and have steady and adequate incomes.

After hearing the evidence and observing the demeanor of the witnesses, the court decided that it was for the best interests of the child that he remain with the respondent and entered an order dismissing the petition.

The petitioner contends as grounds for reversal that the decree of the Oklahoma Court granting custody of the child to petitioner was entitled to full faith and credit in this action and would be res adjudicata on the question of custody, and that the right of a natural parent to the custody of her child is paramount in a controversy between her

and a stranger in the absence of a showing that the parent has neglected, abandoned, or in some manner forfeited her right, or is otherwise an unfit or improper person.

As to the first contention of the petitioner, it is noted that the amendment to the divorce decree was at a time when none of the parties were residents of Oklahoma and had not been for about five years and that it was entered without notice to the respondent or the child. In the case of *People v. Hickey*, 86 Ill. App. 20, where an ex parte divorce decree was obtained in the state of New Jersey, which granted custody of minor child to the father, and the mother and the child were residing in Illinois at the time the decree was entered, the court held the New Jersey decree was not res adjudicata to the question of custody of the child in a habeas corpus proceeding instituted in Illinois and that under such circumstances the New Jersey decree was not entitled to full faith and credit in Illinois. In its opinion the court cited Mr. Bishop in his work on Marriage, Div. & Sep., Sec. 1139, Vol. 2, in speaking of the binding force of a foreign custody order, as follows: "The true rule in the State of its rendition is, that it is res judicata, concluding the question. But it does not conclude the question for all time, since new facts may create new issues. Nor, since the relation of parent and child is a status rightfully, like marriage, regulated by any State in which the parties are domiciled, does the order in one State operate as an estoppel of all future inquiry in the courts of another State wherein the child has acquired a domicile. * * * If the divorce was ex parte against a father who, with his child, was domiciled in another State, the decree for custody would be without jurisdiction, and therefore void." and also Nelson on Div. and Sep., Sec.

980, Vol. 2, where the author, in speaking of the effect of such an order of custody, said: "Such an order is not, however, res judicata as to the right of the State to determine the custody of the child. The decree of another State may be binding as to the parties, but the courts of each State will have the right to determine anew who shall be entitled to the custody of the child, and where its welfare requires, the courts of the latter State may commit the custody of a child to a third person."

The case of *People v. Schaedel*, 340 Ill. 560, is cited by both the petitioner and the respondent. In this case a decree for divorce was entered in Ohio, when all parties resided in that state, awarding the custody of the two sons of the parties to the father. The children remained in the custody of their father for about seven years and until they had reached the ages of 14 and 16, but after their father had remarried they did not get along with their step-mother and they left and joined their mother in Chicago. The father brought an action of habeas corpus in Cook County asking that the children be returned to his custody. He relied upon the provisions of the decree entered in the Ohio court and insisted that it was binding upon the Illinois court in the absence of changed circumstances and that the changed circumstances, to justify a modification must be those which effect welfare of the children by reason of unfitness or inability of the person to whom the children were awarded to continue as the custodian of the children; that the desire of the children was insufficient to warrant a change in custody and that the Illinois court was required to give full faith and credit to the Ohio decree. The court in awarding the children to the mother said at page 564, "The decree of the

Ohio court awarded the children in this case to the father until the further order of the court. In the absence of any showing to the contrary it will be presumed that the law of Ohio is the same as the law of this State touching the custody of children in divorce proceedings. After a divorce decree in this State the custody of the children is always subject to the order of the court which enters the decree and may be changed from time to time as the best interests of the children demand. The decree rendered was res judicata as to the facts which existed at the time it was entered but it was not res judicata as to facts and circumstances arising thereafter, and in subsequent habeas corpus proceedings the court had the right to take later facts into considerations."

In the case of *People v. Wait*, 243 Ill. App. 367, relied upon by the petitioner, the parties were divorced in Ohio while all resided there. Later they moved to Illinois and in a habeas corpus proceeding for the custody of the child the father contended that the decree of the Ohio Court granting custody to him was res adjudicata as to the custody of the child. The court in its opinion at page 371, stated, "The decree of divorce entered in Ohio was not res adjudicata as to the custody of the child. That decree as amended shows that the custody of the child was awarded to the father until the further order of that court. Moreover in the absence of any showing as to the provisions of the Ohio law, it will be presumed that it is the same as the law of this State touching the custody of children in a divorce proceeding. After a divorce decree in this State, the custody of children is always subject to the order of the court which entered the decree and may be changed from time to time as conditions warrant. The primary consideration is the best interest of

the child. In this case we give full faith and credit to the decree of the Ohio court. But since the parties are all now living in this State, the Ohio court is without jurisdiction to make any order touching the custody of the child, and we are, as near as can be done, but carrying out the provisions of the decree when we hold that the custody may be changed according to the facts occurring after the divorce, if the best interests of the child require that it be done."

In the instant case the respondent was not a party to the action which was taken in modifying the decree in the Oklahoma court and it appears that the Oklahoma court did not have the benefit of the evidence introduced before the trial court. It is apparent from the evidence that the circumstances had changed since the decree was originally entered and that these circumstances supported a conclusion contrary to that reached by the Oklahoma court.

We are of the opinion that the amendment to the Oklahoma divorce decree, which amendment was made when all of the parties were nonresidents of that state and without notice to the respondent or the child in question was not res adjudicata on the question of the custody of the child in the trial court. The decree of the Oklahoma court as thus amended was not entitled to full faith and credit. To permit a foreign court to retain jurisdiction and exercise ex parte control under the circumstances of this case would be contrary to the previous holdings of our courts.

As to the second contention of the petitioner, that the right of the parent to the custody of her child is paramount in a controversy between her and a stranger, in the absence of a showing that the parent has neglected, abandoned, or in some manner forfeited her right, or is otherwise an unfit or improper

person, we are of the opinion that no hard and fast rule can be followed in deciding such cases. Each case must be decided upon the particular facts before the court and that this rule has been followed by our courts is manifested in the following decisions.

In the case of *The People v. Porter*, 23 Ill. App. 196, the father placed a child, two years old, with a Mr. and Mrs. Porter and when the child was eleven years old he instituted an action of habeas corpus to regain custody of the child. The court in deciding the child should remain with the Porters said, "In controversies of this character, three matters are to be regarded: the rights of the parent, the rights and interests of the person or persons to whom the care and custody of the infant child has been given by the parent, and the welfare of the child; and of these three the last mentioned is the matter of primary and paramount importance. The father is prima facie entitled to the custody of his minor child, but he may forfeit the right by misconduct or voluntarily relinquish it. If he, by agreement, surrenders the custody of his child to another, such surrender is not absolute and irrevocable; but if a contention arises in the courts with reference to such relinquishment, much will depend upon the characters and the habits of the contending parties, the fact whether the reclamation is sought within a short time or after the lapse of years, and the circumstances of the particular case. All other considerations, however, will be subordinated to the interest and welfare of the child."

In the case of *The People v. Weeks*, 228 Ill. App. 262, where the court held that the father of a motherless fifteen year old girl is not absolutely entitled to the custody of such child and in a habeas corpus proceeding by him for the custody

of such child, an aunt is entitled to her custody, where both are fit persons but that the aunt has had the child's custody at the father's request, from her infancy, and that the child prefers to remain with the aunt, the court said, ". . . that, notwithstanding the seemingly rigorous expression of the law as it is set forth in the statute, the court may, in determining the right of a parent to the custody of his child, give greater heed to the welfare of the child than to the natural right of the parent; in other words, although the parent is morally and pecuniarily fit, if it appears reasonably certain, considering all the circumstances, that it would be better for the welfare of the child that it should remain with a third person, the parent's natural right must give way."

There are numerous other holdings of our courts in cases where the circumstances were similar to those in the case at bar and while the cases cited by the petitioner illustrate the somewhat diverse views that have been expressed, we are of the opinion that Charles should not now be taken from the custody of the respondent, who has had him all of these years. It is apparent that the petitioner, his mother, paid little attention to him and took no action to regain his custody until it appeared some help would be forthcoming from the Veterans Administration. The petitioner knew that Charles was with the respondent and not with his father, who had originally been awarded his custody and she acquiesced in this arrangement and has by her inaction forfeited any right which she had to his custody. She should not now be permitted to take Charles from the respondent against his wishes as this might have a grievous effect upon the child.

We do not find sufficient in this record to disturb the decree of the circuit court. All parties were before the court and from observation and consultation, as well as from testimony, it was in a better position to determine that matter than could an appellate tribunal. (Buehler, 373 Ill. 626, p. 630.)

For the reasons assigned the judgment of the circuit court is affirmed.

Affirmed.

Bartley, P. J. and Culbertson, J., concur.

Not to be published in full. Abstract only.

Clem Smith, Judge.

FILED
SEP 15 1947
Stanley B. Brown
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



Abstract

Gen. No. 10140.

Agenda No. 1.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
FEBRUARY TERM, A. D. 1947.

332 I.A. 280¹

OLGA MALINOFF LINDBLAD,
as Administrator of the
Estate of Doni Malinoff,
Deceased, Plaintiff-Appellant,

vs.

PETER KOVACHEFF, also known as
P. KOVACHEFF, and NAUM ZIZOFF,
Defendants-Appellees.

Appeal from the
Circuit Court of
Will County.

WOLFE,-- P. J.

On May 29, 1945, Olga Malinoff as Administrator of the Estate of Doni Malinoff, deceased, filed a complaint in the Circuit Court of Will County, wherein, she alleges two causes of action on the following promissory note, signed by the defendants, Peter Kovacheff and Naum Zizoff. "June 18, 1938, on or before two years after date, we, or either of us promise to pay to the order of D. Malinoff, Four Hundred and Ten (\$410.00) Dollars for value received with interest thereon, at 6 per cent per annum from June 18, 1938." D. Malinoff died Aug. 30, 1941, and plaintiff was appointed administrator of his estate. The note in question was found among the assets of his estate showing no endorsements thereon, as to payments of either principal or interest.

The second cause of action was for fraud on the part of the

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defendants in falsely representing to plaintiff that the note was paid in full, except \$5.13 in interest, thereby inducing the plaintiff to accept a check for \$5.13 as the balance due.

Plaintiff demanded judgment for \$410.00 plus interest from June 18, 1938, less \$5.13. She also demanded judgment for special damages for the fraud on the part of the defendants including attorneys' fees. On October 23, 1945, the defendants filed their answer in which they deny that they are indebted to the plaintiff in any amount. Numerous motions and counter motions were made prior to the date the case was set for hearing before the court without a jury. On May 21, 1946, pursuant to the plaintiff's motion, the court ordered the defendants, within ten days, to file a sworn list of all documents etc. On the same date, the defendants asked the Court to set the case for trial on Wednesday, June 12, 1946, at ten o'clock A. M. The record shows that plaintiff's attorney was present at this time, and does not disclose that any objection was made to setting the case for that date. On May 29, 1946, the defendants filed a sworn list of documents setting forth all the checks upon which the defense of payment of the note was founded, and also the correspondence between the defendants and plaintiff's attorneys, and further stated that they had no documents, which they were unwilling to produce. On June 3, 1946, the plaintiff also filed admission of facts, in which she admitted that Mr. James W. Faulkner, the former attorney for plaintiff, had examined the checks as submitted by the defendants in their sworn list of documents, and had estimated there was only \$5.13 due on the principal and interest of said note, and that Faulkner had possession of the note in question, and that she accepted a check from the defendants

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for \$5.13, and cashed the same.

On June 3, 1946, the plaintiff admitted the genuineness of the eleven checks on which the defense of payments was based. On June 8, 1946, the plaintiff filed a motion for an order requiring the defendants and James W. Barr, defendants' attorney, to appear at a time and place to be fixed by the Court for taking their depositions, and for a continuance of the case, and a resetting of the date for the trial. The Court overruled this motion, and stated: "Unless there was some insurmountable reason or good legal cause shown, the case would proceed to trial, as formerly set for June the 12th." On June 12, 1946, a motion to take depositions of the defendants and Mr. Barr was renewed. The abstract contains the colloquy between the court and counsel for plaintiff, and counsel for defendant. The Court concluded that the plaintiff had not complied with the rule of Court, and had not shown due diligence in presenting her motions to take the depositions of the defendants, and also in failing to respond to the notice of the defendants to the plaintiffs to take depositions, and refused to grant a continuance.

The defendants announced that they were ready, and the Court called the case for trial. The plaintiff made an oral motion for a continuance, to which the defendants objected, and the Court overruled the said motion. The plaintiff, by her counsel, advised the Court she could not proceed with the hearing of the case. Whereupon, the defendants moved the Court to dismiss the case for want of prosecution, which the Court did, at the cost of the plaintiff, to be paid in due course of administration. It is from this order that the appeal has

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been perfected to this Court.

The pertinent facts to this litigation have heretofore been stated. It is true that the defendants are non-residents, but they had been represented by Mr. Barr, who had consulted with Mr. Faulkner, the plaintiff's former attorney, and had presented all of the evidence and cancelled checks which they had, and which they claimed were in payment of the note in question, and Mr. Faulkner had accepted the same as genuine, and accepted a check for \$5.13, as being the balance due on the account. The defendants had served a notice on the plaintiff to take her deposition. The plaintiff then served a notice on the attorney for the defendants to take his, and the defendants' deposition. The plaintiff refused to attend the hearing to have her deposition taken. The defendants then refused to attend the hearing to take their deposition, but Mr. Barr did appear, pursuant to the notice, to have his deposition taken. It does not appear from the motion what evidence they expected to procure from the defendants, nor is it shown in any way why they could not procure the same evidence by cross-examining one, or both of the defendants as an adverse witness, as provided by the Statute. From a reading of this record, it is our conclusion that the trial court properly dismissed the suit for failure to prosecute the same. The judgment appealed from is affirmed.

Affirmed.

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Abstract

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Gen. No. 10062.

Agenda No. 19.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A. D. 1946.

332 1-1-200²

NORTH AMERICAN ACCEPTANCE
CORPORATION, a corporation,
Plaintiff-Appellant,
vs.
R. C. BIHLMEIER,
Defendant-Appellee.

Appeal from
County Court,
Rock Island County.

WOLFE,-- P. J.

Herbert S. Rohm was the owner of an automobile which he sold to the Schierbrock Motors of Moline, Illinois. This company, on Aug. 25, 1941, sold the same automobile to Richard Clarkson, who executed a conditional sales contract to the Motors Company. On the same day, for a valuable consideration, the Schierbrock Motors assigned the conditional sales contract to the plaintiff, the North American Acceptance Corporation. At the time of the execution of the conditional sales contract, the automobile was delivered to Clarkson. At the time of the sale of the automobile from Rohm to Schierbrock Motors, Rohm assigned the certificate of title of the automobile to Schierbrock Motors. On Sept. 25, 1941, Schierbrock Motors assigned the certificate of title to Clarkson. On September 27, 1941, Clarkson surrendered the certificate of title

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to the Secretary of State, and in due course of time, received a new certificate of title, showing him to be the owner of the automobile.

On October 20, 1941, the State Bank of East Moline made a loan to Clarkson, who secured its payment by giving a chattel mortgage on the automobile. In Feb. 1942, Clarkson applied to the Secretary of the State for a corrected certificate of title, which was issued to him. This certificate disclosed that the automobile was subject to a chattel mortgage in favor of the State Bank of East Moline. In April 1942, the Midwest Motors bought this automobile from Clarkson, and then sold the same to the defendant, R. C. Bihlmeier. At the time of the sale to Midwest, Clarkson endorsed the corrected certificate of title to Midwest, which in turn endorsed it to the defendant, Bihlmeier.

In June 1942, the plaintiff, the North American Acceptance Corporation, demanded of Bihlmeier the possession of the automobile because of default in the conditional sales contract, which they held. The defendant refused to surrender possession of the car and a suit in replevin, was instituted in the County Court of Rock Island, Illinois. After the issues had been made, the cause was submitted to the Court for determination without a jury, which resulted in a finding that the defendant was the owner of the automobile, and entitled to the possession thereof. Judgment was rendered on that finding, and the plaintiff appealed.

The case was heard upon motions for summary judgment for each of the parties and affidavits in support thereof. The

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trial court came to the conclusion that the plaintiff was estopped to assert its lien against the defendant whom he found was a bona fide purchaser for value, inasmuch as Clarkson had been vested by plaintiff's assignor, with possession of the automobile, and indicia of ownership, in the form of said certificate of title.

The appellee contends he is entitled to invoke the doctrine of equitable estoppel, both in his own right, and as a vendee of the Midwest Motors, and cites cases sustaining his contention. No doubt, as stated in these cases, under certain circumstances, this is a correct statement of law, but before such a doctrine can be invoked, there must be facts and circumstances shown by the record in the case to justify the application of the doctrine. After the Schierbrock Motors of Moline assigned the conditional sales contract to the appellant, they had no further interest, right or title in the automobile in question, and anything which they did relative to the possession of the car cannot be held to be prejudicial to the right of the assignee of the sales contract, unless the assignee did something that would mislead any future purchaser in regard to the title of the automobile. The record is silent of anything that the appellant did, or failed to do which would affect its right of possession.

It is contended that the bill of sale is not in fact a conditional sales contract, but is in effect a chattel mortgage. The record discloses that the conditional sales contract was entered into in good faith with the Schierbrock Company and that the deal was financed by the North American Acceptance Company. So far as we can ascertain from the record in this case, everything seems to be open and above board, and we find no merit in the appellee's contention that this was not a bona fide conditional sales contract.

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It is our conclusion that the trial court erred in finding the appellee, Bihlmeier, was entitled to the possession of the car, but should have found that the North American Acceptance Corporation was entitled to the possession of the automobile in question. The judgment of the County Court of Rock Island County is reversed, and the cause remanded to said Court.

Reversed and cause remanded.

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H. J. Hoff
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Abstract

Gen. No. 10123

Agenda No. 23

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, A. D. 1947.

126
332 I.A. 281

LOUIS BARTO
Appellee

vs

LIBERTY TRUCKING COMPANY
a corporation
Appellant

APPEAL FROM THE
COUNTY COURT OF
McHENRY COUNTY

Dove, J.

About 2:30 o'clock on the morning of June 10, 1945 the Plymouth automobile of the plaintiff was being driven south on the two lane State Route No. 14 four miles south of Harvard, Illinois by Joseph Barto, the son of appellee. In the front seat of the car seated beside Joseph Barto was Henry Ottens. Bert Sipsma and Wilmer Carlson were seated in the back seat. As the car proceeded in a southerly direction a car going north approached the Barto car. Both cars dimmed their lights ~~as the car passed.~~ It was raining and the windshield wipers were working on the Barto car. The ^{straight and level} pavement was wet. The Barto car was travelling between thirty and thirty-five miles per hour and the lights in that car were in good condition and operating normally. Immediately after the Barto

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car passed the car approaching from the south and when within about sixty feet of the Diamond-T Tractor and Frauehauf Trailer belonging to the defendant, the driver and occupants of the Barto car observed this tractor and trailer. It was unlighted and according to the testimony of the plaintiffs' witnesses it had stopped and was parked on the west traffic lane and headed south. There were no lights of any kind on the truck or trailer and no flares or lanterns thereabout. Joseph Barto, the driver of plaintiff's car applied his brakes but the front end of plaintiff's car struck the rear end of defendant's trailer resulting in a stipulated damage to plaintiff's car of \$243.50.

The driver of the defendant's tractor testified that he left Janesville, Wisconsin about 1:40 A.M. and had travelled about forty miles when the collision occurred. The witness continued; "prior to the accident the lights went out. I then applied the brakes a little too hard and the truck jack-knifed and the trailer came around to meet the front end. At that time another car showed up traveling in the opposite direction, the lights from which showed me the road and I gradually stopped. After the lights went out I couldn't see ~~anything~~ the condition of the shoulder or anything. The car that passed had on bright lights, bright at the time they passed the truck. At the time the accident happened the truck was just moving." This witness further testified that he checked the lights at Janesville and that all clearance lights were working and that he found everything okeh and that he had three flare pots with him in the tool box.

The charge in the complaint was that the defendant carelessly and negligently permitted his tractor and trailer to

stand stopped in the right hand lane of Route No. 14 facing in a southerly direction without any lighting equipment and failing to cause flares, lanterns or other signals to be lighted on the highway. The answer of the defendant denied this charge. The issues made by the pleadings were submitted to a jury resulting in a verdict finding the defendant guilty and assessing plaintiff's damages at the stipulated amount of \$243.50. Upon this verdict judgment was rendered and defendant appeals.

The errors relied upon for reversal are that the trial court erred in denying defendant's motion at the close of all the evidence for a directed verdict and erred in denying his motion for judgment notwithstanding the verdict. Counsel for appellant state that the only question involved is whether or not there is any evidence from which the jury could have found defendant guilty and argue that an automobile is a piece of machinery; that the operator thereof is only required to do what an ordinarily prudent person would do under like circumstances; that the lights on the truck had been inspected and tested and found to be in working condition at Janesville, but had failed unexpectedly; that there was nothing the driver of the truck could have done or that an ordinarily prudent person would have done which would have prevented the lights going out and therefore there was no evidence upon which the jury were warranted in returning the verdict it did and the trial court therefore erred in not rendering judgment for the defendant notwithstanding the verdict of the jury.

Just when the lights on appellant's truck and trailer ceased to function or how long before the collision they went out, does not definitely appear. The lights were out prior to

the time the third car approached from the south going north. At least before it had passed appellant's truck because the driver of the truck testified that when the lights did go out he applied the brakes but applied them too hard the result being that the truck jack-knifed and the trailer came around to meet the front end. The driver of the truck then says this oncoming car had on bright lights and it was the lights from the oncoming car which showed him the road. All of the evidence is that when the collision occurred the tractor and trailer were in the right traffic lane. The jury therefore may have inferred from all the evidence that the tractor and trailer had proceeded some distance and that some time elapsed after the lights went out and before the collision. The testimony of plaintiff's witnesses was that the tractor and trailer ^{was} stopped on the pavement when the driver and passengers in plaintiff's car first observed it. The driver of the trailer said it was just moving preparatory to stopping, ~~that it was~~ from which it might be inferred that he had not, at the time of the collision, an opportunity to bring his trailer to a stop after the lights had ceased to function. No effort was made by the driver of the tractor to get off of the pavement and there was no evidence as to the width or condition of the shoulder. Under ~~all~~ the authorities the jury were the sole judges of the facts in a case of this character and it is their peculiar province ~~promise~~ to determine wherein the truth lies and the witnesses to whose testimony credit should be given.

It is not ~~not~~ insisted that the court erred in the reception or rejection of evidence and from the abstract it

does not appear that any instructions on behalf of either party were tendered or given by the court to the jury containing applicable principles of law. There is no error in this record requiring the reversal of this judgment and the judgment of the County Court will therefore be affirmed.

Judgment affirmed.

does not appear that any instructions or details of either
party were furnished or given by the court to the jury con-
cerning applicable principles of law. There is no error
in this record regarding the removal of this judgment and
the judgment of the court will stand as affirmed.

Very truly yours,
J. W. McLaughlin

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Dove

Gen. No. 10132

Agenda No. 5

IN THE APPELLATE COURT

OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1947.

MARGARET M. REED
APPELLEE

VS

DONALD E. REED
APPELLANT

APPEAL FROM THE CIRCUIT
COURT OF WILL COUNTY

Dove, J.

From a decree awarding the plaintiff, Margaret M. Reed, separate maintenance, attorney fees and costs and dismissing the counter-claim of Donald E. Reed for divorce the defendant and counterclaimant Donald E. Reed, appeals.

The record discloses that the parties were married on June 15, 1942 and have no children as a result of their marriage; that the plaintiff had been previously married and had a daughter ten years of age at the time of her mother's marriage to appellant. At the time of the hearing appellee was thirty years of age. The parties to this proceeding and appellee's daughter lived together and their lives were apparently uneventful until the latter part of December 1944 or the first of January 1945.

Appellant was employed and worked in the Carnegie steel mills rather steadily until the separation which occurred on April 11, 1945. He usually left for his work at six o'clock each morning. Appellee would arise at five o'clock, prepare his

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NEW YORK 10018

breakfast and pack his lunch. His father and mother lived nearby and their relations were friendly and pleasant. For some time prior to his death on February 11, 1943 appellant's father was ill and appellee assisted in his care and frequently prepared his meals.

In the early part of January 1945 a change took place. Appellant continued to work but would not spend any time at his home or in his wife's company. He came home from work, changed his clothes and would leave, remaining away until the early hours of the following morning. He owned an automobile and when he left he always took it and refused to permit appellee to accompany him. During this period of time appellee found in the car feminine hair, hair pins, lip stick, cigarettes (although appellant did not smoke) and other articles. When asked for an explanation as to his whereabouts, conduct and actions he either ignored her questions and remained silent or answered her inquiries by telling appellant ^{it} was none of her business. On Sunday, April 8, 1945, appellant left their home in his car, dressed in his Sunday best and stated he was going to work at Gary, Indiana. At four o'clock the following Tuesday morning he returned to his home. His clothes were wrinkled. He wore a white shirt and this shirt was offered and admitted in evidence and certified with the record to this court. There appear thereon several red marks which appellee testified were lipstick marks. Appellee did his washing and testified that she had on several occasions noticed lipstick on his shirts. The next day, April 11, 1945, appellant returned home about six o'clock in the evening. Appellee had dinner prepared but appellant stated he was not hungry and was going over to his mother's to take down the storm windows and put up the screens. Appellant, appellee and appellee's daughter walked over to

the home of appellant's mother. Appellant testified that appellee said to his mother that if appellant went any where that night that his mother should kiss him good-bye because she would kill him. Appellee denied this. Upon appellee's return to her own home she looked in the automobile and found six packages of cigarettes in the car and a pound box of candy, hair-pins/^{and} cigarette butts and she was in the driveway with the cigarettes and candy in her hands when appellant arrived. According to her testimony he took the box of candy/^{away} from her and hit her with the box on her right shoulder. She picked up a board and hit him. According to appellant's testimony appellee was "ransacking" the car when he returned from his mother's: "I walked over to the car" he said and "as she stood near the car she had some cigarettes in her hand. She had a box of candy in her other hand. I told her to put them back, that they didn't belong to her. I didn't knock or push the cigarettes out of her hand, all I did was to move her arm and they fell to the ground. When I moved one arm, she let go to take a swing at me with her fist. I didn't take any swing at her. I went into the house and she said that if I went any where she would puncture all the windows and take the air out of the car so I couldn't do anything. She started to break the window. She got the kid's baseball bat, about three feet long, from behind the kitchen door and cracked me with it. I ran out of the house. She ran after me. She hit me with a baseball bat on the left shoulder. I was out by the car when she hit me and I took the bat away from her and got in the car and drove off." Shortly after he left, appellant returned, took his clothing and took up his residence at the West Pines Hotel in Joliet. The hotel register of that hotel and the evidence in connection therewith discloses that appellant on the evening of April 11, 1945 registered with a Mrs. Reed and was assigned to a room at this hotel and they continued to occupy that

room until April 29, 1945 when he registered as Mr. and Mrs. D. E. Hayworth and they were assigned another room. On May 2, 1945, May 3, 1945 and May 8, 1945 he again registered as Mr. and Mrs. Hayworth and they were assigned a room. On May 22¹⁹⁴⁵ he and his female companion were moved to another room in the same hotel and remained there until April 13, 1946.

The evidence is further that appellant worked at the Carnegie Steel mill earning between \$80.00 and \$110.00 every two weeks. He was not working at the time of the hearing and testified he was not physically able to do so. His father died in 1943 and his mother in February 1946 and he is the sole beneficiary of her estate which consists of two pieces of improved real estate and some \$7500.00 in personal property.

The only conflict in all the evidence found in this record relates to the details of the trouble on the evening of April 11, 1945 preceding the time appellant left his wife and home. Appellant is corroborated to some extent by two boys, thirteen and sixteen years of age respectively when they testified and appellee is corroborated by her daughter. We have read all the testimony as abstracted and are unable to say that the decree is not justified by the evidence. Appellant left appellee. His course of conduct was inexcusable. For more than three months before he left, his conduct was such as to lead to but one conclusion and that was that he no longer had any affection for his wife and preferred the association of another woman. It is true that while angry his wife struck him either with a board or a ball bat but such conduct on her part afforded him the excuse he was looking for, which was to move his personal belongings from his own home and take up his abode at a hotel with the woman of his choice.

Counsel for appellant argue that even though appellee might be dissatisfied with the conduct of her husband she had no right to take the law into her hands and use physical force toward appellant and that the evidence in support of his counterclaim for divorce shows that appellee without reason or excuse had attempted the life of appellant and that therefor the trial court erred in dismissing his counterclaim. The evidence does not show that appellee ever attempted to take the life of appellant and in our opinion falls far short of warranting a decree of divorce on that ground. There was no error in dismissing the counterclaim for want of equity.

Counsel for appellant further insists that the evidence does not support the chancellor's findings that appellee is living separate and apart from appellant without her fault. The undisputed evidence is that on April 11, 1945 she resided in ²²one of the apartment in Joliet which now belongs to appellant; that she has continued to live there and was living there at the time of the hearing. Appellant has contributed nothing to her support since that time and has shown no inclination to return to his former home and never has returned since he left the second time on the evening of April 11, 1945.

Appellant does not deny that for three months prior to the evening he left his wife on April 11, 1945 he never accompanied her any where; he refused to talk to her or pay any attention to her; with the exception of one night he was away from home every evening and remained away until the early hours of the following morning; he did not cohabit with her

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

CHICAGO, ILLINOIS

TO THE PHYSICS DEPARTMENT

OF THE UNIVERSITY OF CHICAGO

FROM THE PHYSICS DEPARTMENT

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and refused to inform her where he was going or what he was doing and refused to give her any explanation of any kind as to his conduct. His conduct necessarily rendered her life miserable and unendurable and the only conclusion that can be arrived at from reading this record is that appellant was unfaithful to his marriage obligations prior to April 11, 1945. The law does not require a wife to put up with any such conduct on the part of a husband as the record in this case discloses. (Hill v. Hill, 238 Ill. App. 189; Johnson v. Johnson, 125 Ill. 510).

Without taking into consideration the conduct as disclosed by this record of appellant, after the separation, we are of the opinion the chancellor was warranted in his findings and decree and that decree will be affirmed.

Decree affirmed.

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GEN. NO. 10157

AGENDA NO. 2

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

32

MAY TERM, A. D. 1947

332 I.A. 282²

JOHN OPIE
Plaintiff-Appellee

vs.

HARRY G. WEAVER
Defendant-Appellant

APPEAL FROM THE
CIRCUIT COURT
DUPAGE COUNTY

Dove, J.

On November 21, 1945 John Opie filed in the circuit court of DuPage County his complaint and thereafter on January 10, 1946 his amended complaint. This amended complaint alleged, among other things, that he and the defendant, Harry G. Weaver, entered into an oral agreement to lease certain rooms of the second floor of the Liberty Building in Wheaton, Illinois as an attorney's office for one year from October 1, 1945 to September 30, 1946 at a rental of \$50.00 per month; that defendant entered into possession thereof but breached said oral agreement, first by using said premises as living quarters as well as a law office and second by refusing to execute a written lease. The plaintiff averred that he had sustained damage by reason thereof to the amount of \$100.00 and therefor brought suit for damages and for possession of the premises.

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The defendant filed his answer in which he denied that he ever entered into any oral agreement to lease the premises and averred that he entered into possession of the premises in 1938 under a written lease with the Prudential Insurance Company, the then owner of the premises and has since occupied same; that he was then in possession under a written lease which consists of an offer to rent the premises made by letter on October 15, 1945 and the acceptance thereof by letter on October 17, 1945; that since the making of said lease defendant has always paid the rent each month which the plaintiff has accepted. The answer denied each and all of the allegations of the amended complaint and attached thereto were the two letters of October 15th and October 17th respectively, referred to in the answer.

The record discloses that on April 12, 1946 a pre-trial hearing was held and at the conclusion thereof the following judgment order was entered, viz:

"This matter coming on to be heard on pre-trial hearing, and the Court having heard the statements of the Plaintiff and of the Defendant, finds that the parties hereto have agreed as follows: The Plaintiff hereby leases to the Defendant the premises described in the Amended Complaint herein, for one year ending on September 30th, 1946, at a monthly rental of Fifty (\$50.00) Dollars, for use as a law office only. The Defendant agrees to vacate said premises promptly upon the expiration of said lease, and to have present subtenant vacate by May 1, 1946. The Court having specifically asked both the Plaintiff and the Defendant if this is their agreement, was advised by each of them, that this is their agreement. IT IS THEREFORE ORDERED, on motion of Edward F. Zahour, attorney for Plaintiff, that the above entitled cause be and the same is hereby dismissed without costs, all costs having been paid, and all matters in controversy having been settled.

Win G. Knoch,
Judge."

On October 15, 1946 the plaintiff served a notice on defendant to the effect that he would appear in court on October

15, 1946 and move the court to issue a writ of restitution. The parties did appear in court on that day and the court entered the following order, viz:

~~"On motion of Edward F. Zahour, attorney for Plaintiff, John Opie, the Court having heard arguments of counsel for Plaintiff and Defendant, Harry G. Weaver, on plaintiff's motion for writ of restitution, the Court having jurisdiction: It is hereby ordered that the plaintiff's motion be continued to November 15, 1946; It is further ordered that Defendant vacate the premises in question by November 15, 1946, or writ of restitution will issue. It is also agreed between the parties that the tender in Court of check #3052 in the amount of \$75.00 be considered as rent payment from October 1, 1946 to November 15, 1946, in order to assist Defendant to find new offices.~~

Enter: Win G. Knoch,
Judge.

Wheaton, October 18, 1946."

The record then discloses that on November 22, 1946 the court entered the following order, viz:

"On motion of Edward F. Zahour, attorney for Plaintiff, John Opie, the Court being fully advised in this matter that Defendant, Harry G. Weaver, having agreed to vacate the premises described in the amended complaint at pre-trial hearing held on April 12, 1946; and said date to vacate being set for September 30, 1946; and the Court being apprised of Defendant's continued possession in violation of said agreement which was the basis of the dismissal order. It is therefore ordered that the portion of the order entered April 12, 1946, dismissing the above entitled cause be vacated; and that Defendant, Harry G. Weaver, being in default of said agreement entered at pre-trial conference on April 12, 1946 and being in default of order entered October 18, 1946, allowing Defendant until November 15, 1946, to vacate; and that Defendant's practices are tantamount to fraud on the Court. It is further ordered that Defendant, Harry G. Weaver, be evicted from said premises described in the amended complaint; the writ of restitution to be issued on November 26, 1946.

Enter: Win G. Knoch,
Judge"

In obedience to this order a writ of restitution was issued and served on defendant on November 26, 1946. Notice of

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appeal was filed that day which was subsequently ordered to operate as a supersedeas and the record is here on defendant's appeal.

Counsel for appellant argue that the instant case was dismissed on motion of appellee's attorney on April 12th, 1946 that this order was a final judgment and could only be vacated within thirty days thereafter or pursuant to a motion made within such thirty days; that when the court vacated the order dismissing the action on November 22, 1946 more than six months had elapsed and therefore the court had lost jurisdiction to enter any such order and having lost jurisdiction to proceed further the order directing a writ of restitution to issue was a nullity.

Counsel for appellee concedes that the law regarding the jurisdiction of the trial court to vacate its judgment within thirty days is as contended by appellant (Ill. Rev. St. 1945, chap. 110, sec. 50 (7)). Counsel state that this cause is unique in that it involves the capacity of the court to enforce its own induced agreement between the parties at a pre-trial conference, that the court found that defendant's dilatory practices were a flout on, or insult to, the court and that justice required restitution of the premises to the plaintiff. Counsel very frankly concludes his argument with the statement that whether or not a court retains jurisdiction to enforce agreements it has engendered has not been decided as far as counsel has been able to discover after making an exhaustive search.

The order of April 12, 1946 recites that the plaintiff "hereby" leases to the defendant the premises for one year ending

appeal was filed by the appellant on April 15, 1934, and the appeal was heard on April 15, 1934. The appellant was represented by counsel and the respondent was represented by counsel. The appeal was heard by the Board of Appeals and the Board of Appeals affirmed the decision of the Board of Appeals.

The appellant was represented by counsel and the respondent was represented by counsel. The appeal was heard by the Board of Appeals and the Board of Appeals affirmed the decision of the Board of Appeals. The appellant was represented by counsel and the respondent was represented by counsel. The appeal was heard by the Board of Appeals and the Board of Appeals affirmed the decision of the Board of Appeals. The appellant was represented by counsel and the respondent was represented by counsel. The appeal was heard by the Board of Appeals and the Board of Appeals affirmed the decision of the Board of Appeals.

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The appellant was represented by counsel and the respondent was represented by counsel. The appeal was heard by the Board of Appeals and the Board of Appeals affirmed the decision of the Board of Appeals. The appellant was represented by counsel and the respondent was represented by counsel. The appeal was heard by the Board of Appeals and the Board of Appeals affirmed the decision of the Board of Appeals.

September 30th, 1946 and that defendant agrees to pay rent, use the premises for a law office only, have the present subtenant vacate by May 1, 1946 and that he, the defendant, will vacate promptly upon the expiration of this lease. That order is evidence of the agreement of the parties that day made and included in the same order is the judgment dismissing the suit which had for its purpose the obtaining of an order for possession of these same premises and for damages.

The next step in the case, as shown by the record, is the application to the same court in the same proceeding for an order directing a writ of restitution to issue. September 30th, 1946, the date appellant agreed to vacate the premises, had passed. Notwithstanding the fact that the instant suit had been dismissed six months previously the court, on October 18, 1946 assumed jurisdiction, continued the motion for a writ of restitution until November 15, 1946 and ordered appellant to vacate the premises by November 15, 1946 upon the threat that if he did not, a writ of restitution would issue at that time. Nothing appears to have been done on November 15, 1946 but on November 22, 1946 the order of April 12, 1946 dismissing the suit was vacated and it was ordered that the defendant be evicted from the premises and that a writ of restitution be issued on November 26, 1946.

The purpose of a writ of restitution in a forcible detainer proceeding is to put the plaintiff who has obtained the judgment awarding him possession of the premises in possession thereof. It issues after it is determined upon a trial of the issue that the plaintiff is entitled to the

possession of the premises claimed and a judgment therefor has been rendered and then not until the expiration of five days from the rendition of said judgment. (Ill. Rev. St. 1945, chap. 57, sec. 13-19).

The provisions of the lease evidenced by and embraced in the order of April 12, 1946 were never breached by the defendant until after September 30th, 1946. The instant suit was filed on November 21, 1945. No proceedings, as provided by the Forcible Entry and Detainer Act, were ever instituted after the action commenced on November 21, 1945 was dismissed on April 12, 1946 and no judgment was ever rendered which could form the basis for the issuance of a writ of restitution.

It is true that appellant did not vacate the premises on September 30th, 1946 and thereby failed to do as he had agreed on April 12th, 1946 but his conduct in that respect did not authorize the court to enter orders in a suit that had been dismissed six months previously or set aside that order of dismissal at a time when the court had completely lost jurisdiction.

The order of November 22, 1946 was a drastic one. It finds the defendant had violated his agreement to vacate his offices on September 30, 1947 and that therefore he should be ~~summarily~~ ^{summarily} evicted and that a writ of restitution should issue within four days. The court had no jurisdiction to make any such order and the judgment order appealed from is therefore reversed.

Judgment-order reversed.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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Abstract

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Gen. No. 10162

Agenda No. 5

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A. D. 1947

43
332 I.A. 253

JOAN MERRILL FRENTRESS
Plaintiff-Appellee

vs

HAROLD DIEHL FRENTRESS
Defendant-Appellant

APPEAL FROM THE
CIRCUIT COURT OF
CARROLL COUNTY

Dove, J.

On March 13, 1944 the parties to this proceeding were divorced by the circuit court of Carroll County. The decree found the defendant, Harold D. Frentress, guilty of extreme and repeated cruelty and by agreement of the parties it was ordered that their two children, Merrill D. Frentress, born July 22, 1941 and Stanley Sue Frentress, born April 15, 1943 should remain in the custody of the defendant's parents in Iowa until the further order of the court. The plaintiff was granted the right to visit her children at all reasonable times and places but she was to make no claim for alimony while the order with reference to the children remained unchanged.

On October 9, 1946 Joan Frentress filed her petition in the divorce proceeding alleging that since the divorce she married Paul Halfman of Savannah, Illinois and that she and her husband have a proper home and are willing and desire to support,

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Gen. No. 10158

THE

APPEAL FROM THE DECISION OF THE

APPEAL COURT

IN THE

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JOHN H. HARRIS, JR.
HARRIS-HARRIS

vs

HARRIS HARRIS, JR.
HARRIS-HARRIS

JOHN H. HARRIS, JR.
HARRIS-HARRIS

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of which it is the duty of the court to decide. The divorce
granted by the court is not a nullity. The divorce
found by the court is not a nullity. The divorce
and the court is not a nullity. The divorce
ordered that the children, William D. Harriss, born
July 2, 1911 and John H. Harriss, born July 1, 1913
should remain in the custody of the father, John H. Harriss, Jr.
until the children reach the age of 18 years. The father is to
the right to visit and to have custody of the children at all times
places but she was to make no claim for alimony. Also the order
with reference to the children remained unchanged.

On October 1, 1943, John Harriss filed his petition
in the divorce proceeding alleging that since the divorce she
married Paul Harriss of Lawrence, Illinois and that she and her
husband have a proper home and are willing and desirous to support

maintain and care for said children; that petitioner is a woman of good moral character and that the children are of tender age and require the care of their mother. The petition also charged that the defendant and paternal grandparents had on various occasions refused to permit petitioner to see ~~her~~ children alone. The prayer of the petition was that the original divorce decree be modified and that she be given the care, custody, education and control of the children and that defendant be ordered to deliver the children to her and to pay for their support. The defendant answered the petition, admitting petitioner's remarriage and denying that he or his parents refused to permit petitioner to see the children. His answer alleged that he had no information as to his former wife's circumstances but averred that the children were receiving all the care and attention necessary or proper and that he neither wished to affirm or deny the allegations as to good moral character and proper home environment but stated that he would present evidence upon the hearing of the petition. The answer admitted that it was his duty to contribute to the care and support of his children and stated that he was financially able to do so and alleges that he desired to do so and was doing so.

Upon a hearing before the chancellor an order was entered modifying the former decree and providing that "in lieu of said children remaining in the custody of the parents of the defendant, said Joan Merrill Halfman shall have the children under her care, custody, education and control commencing immediately and reserving to the father the right of reasonable visitation at all reasonable times and places." The order found that the defendant was financially able to contribute to the support of

the children but reserved that question and directed the defendant to immediately deliver the children to petitioner at her home in Savannah and provided that neither party should take the children outside of the state of Illinois. To reverse this order, this appeal is prosecuted.

The record discloses that on December 30, 1943 the parties and their children were living together at Savanna, Illinois and had been living in the home they then occupied since September of that year. On the evening of that day they agreed to separate and on the following morning the husband left and with the consent of his wife took the children to the home of his parents who lived on a farm near Robbins, Iowa. While the divorce proceedings were pending the parties executed a written agreement reciting that the children were then in the custody of their paternal grandparents and that they should so remain until the court should otherwise order; that each party should retain his or her own property free and clear of any claims of the other; that plaintiff, the mother, should have the right to visit her children at all times and places but would make no claim for alimony. The husband, however, agreed to pay the costs of the divorce suit including his wife's attorney fee.

On December 31, 1943 about one o'clock in the afternoon, appellant with his two children arrived at the home of his parents. The boy was not quite two and one-half years of age and the baby girl eight and one-half months old. Appellant's mother and father were forty-five and forty-eight years of age respectively. The weight of the evidence is that the elder child had impetigo and was covered with sores. The baby was sore on

her back, side and stomach; was unable to sit up and the clothing of both children was not clean; there was no bottle or formula or food for the baby. Appellant's mother bathed and cleaned the children up, called a practical nurse and took them to a physician who prescribed for the children and for the past three and one-half years the children have made their home with appellant's parents. Appellee did not see her children from December 31, 1943 until March 31, 1944. She came again about three months later and stayed 20 minutes, and since May 31, 1944 appellee has come to see the children about 9 times. The last time being the first of September 1946 at which time the boy was at the nearby school and appellee went there to see him.

Appellee testified that she occasionally visited the home of the parents of her former husband in Iowa but was never permitted to see her children alone until September 2, 1946; that she frequently requested to take her children to her parent's home, her parents living in Iowa a short distance from the home of the parents of appellant, but that she was not permitted to do so; that on February 27, 1945 she desired the children to come to the home of her parents to a birthday party but the request was refused and that in May 1944 she requested that her children be permitted to go to church with her but was denied that request. She further testified that her husband's parents always permitted her to see the children whenever she wished and the only thing that they ever refused her was to permit her to take the children in her personal care either to the home of her parents or to church.

In October 1944 following the divorce in March of

that year, appellee remarried and is now living with her husband, her husband's brother, the mother of her husband and the small daughter of appellee and her present husband, ^{the daughter being} one year of age at the time of the hearing. It appears that the home of appellee is located in Savanna and consists of five rooms. Appellee testified: "there are five people now living in our house in Savanna, Illinois now. The house is not partitioned and we all live together, my husband, my child, Henry Halfman and his mother, in community with each other. We eat at same table and cook in same kitchen. There are three bedrooms."

^{of appellee}
~~The~~ husband is a garage mechanic earning \$50.00 per week. Appellant is a locomotive fireman regularly employed by the Milwaukee Railroad. In August following the divorce he was inducted into the military service and after his discharge he went to work as a fireman on the Milwaukee Railroad and his run is from Savanna to Atkins, Iowa, a town not far from where his parents live in Iowa. At the end of his run he lives with his parents and children and when in Savanna he has a room. The boy goes to kindergarten and there is a school one-half mile away which he will enter this fall. They go to church and Sunday School every Sunday and appellant contributes to their support. At the home of appellant's father and mother lives appellant's sister, Marcia Lu, 13 years of age and appellants two children, Merrill and Stanley Sue. Appellee has always been permitted to see and visit with them ~~whenever~~ ^{but} she desired ~~was~~ refused permission to take them down the road for a walk alone or in her car unless some one else was along. Appellant's father, in addition to farming, works for the Northwestern Railroad, earning 84¹/₂¢ per hour and receives about \$200.00 per month for his work on the railroad. His farm consists of 120 acres and appellant's father bought it in 1940 for \$75.00 an acre and there was at the time of

the hearing, a \$5000.00 mortgage upon it. Appellant's father testified, ^{and it is undenied,} that he had taken the children down to appellee's parents who live in the same neighborhood on an average of twice a week and at one time, left them there for three-quarters of an hour and then came back and picked them up.

The foregoing is a *fair* resume of the evidence.

There is nothing in this record to indicate that appellant is an improper person to have the custody of his children, nor is it suggested that the paternal grandparents have not given these children loving care and an excellent home. On December 30, 1943 when the separation was agreed upon it was the desire of appellee that her children be placed in the custody of their paternal grandparents. She thought then that it would be a good home for the children and it has proven to be. The suitability of that home has not been challenged by anything appearing in this record and appellee herself concedes that the children have been well cared for and makes no criticism of the home or of the paternal grandparents other than that she feels she should have been permitted to take her children away from their home whenever she wished. It is not suggested that there has been any change in the home or in the children's surroundings since the children became members of that home. The only change that has taken place is that appellee's condition has changed. She has remarried and has a child by her second marriage. Her present husband testified that he was willing to take the two children of his wife by her former marriage into his home and that he did not feel that it would be a hardship upon his wife to do so. ~~It seems unnecessary to~~

In Linn v. Linn, 329 Ill. App. 652 the custody of an eight year old child, Olga Linn, was involved. It appeared in that case that the parties were married on December 11, 1933 and continued to live together until September or October 1936. During such time their home was in the home of the maternal grandparents and Olga was born on September 28, 1937. On March 4, 1942 the husband ^{Orval Linn} obtained a divorce from his wife, ^{Dorothy Linn,} on the ground of desertion and the decree awarded the custody of Olga to the maternal grandmother, Della Jacobs, until the further order of the court and ordered the husband to pay Mrs. Jacobs \$5.00 per week for her support. On April 17, 1946 the mother filed in the circuit court of Macon County, her petition for a rule on her husband to show cause why he should not be held in contempt of court for failure to make the payments to Mrs. Jacobs as provided in the decrees of divorce entered on March 4, 1942. The husband filed his answer to this petition in which he admitted he was \$122.00 in arrears and stated that this amount would be paid prior to the hearing on the petition. On the same day he filed a counter-claim asking that he be granted the custody of Olga. An answer to the counter-claim was filed and at the conclusion of the hearing, a decree was rendered transferring the custody of Olga from her maternal grandmother to her father and the mother appealed. The evidence disclosed the maternal grandparents were each 59 years of age at the time of the hearing; that Mr. Jacobs was a laborer in moderate but comfortable circumstances, owned their own home and four adjoining lots; that the home was well kept and that no one other than Mr. and Mrs. Jacobs and Olga live there except the mother, Dorothy, who makes her home there when not working. Dorothy has never remarried.

and worked as a waitress in a restaurant and tavern until Olga was about 4 years of age. When she is employed she visits Olga two or three times a week and on week-ends. In June 1942 the husband, Orval, remarried and has two children, one born in November 1942 and one in November 1943. They live in a four room modern apartment in Chicago. The husband is a truck driver and makes approximately \$70.00 per week and does not drink or smoke. The present wife of the husband had seen Olga on a couple of occasions and had written her letters and received letters from her and she testified that she was willing and anxious to have Olga come into her home and that she would give her the same care and attention that she gave her own children.

In reversing the decree of the circuit court and directing that court to dismiss the counter-claim, the court in its opinion commented upon the fact that the custody of Olga was given to Mrs. Jacobs by mutual agreement and that it was agreeable at the time the divorce decree was rendered to both plaintiff and defendant that under the facts existing, the particular divorce decree be entered as entered and the fact that the wife was the one adjudicated by the decree to have been guilty of desertion was not worthy of much consideration. The court then continued: "The paramount consideration in determining to whom the custody of a child shall be awarded, after a divorce, is the welfare and best interests of the child. (27 C. J. S. p. 1170; Buehler v. Buehler, 373 Ill. 626, 630.) A decree fixing the custody of a child is final on the conditions then existing and should not be changed afterwards unless on

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altered conditions since the decree, or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child. (Thomas v. Thomas, 235 Ill. App. 488, 493; 27 C.J.S. p. 1188) While a very large discretion is permitted the chancellor hearing such a case, yet it is a judicial discretion and subject to review."

In 46 C. J. 1248, sec. 23, it is stated that a court may well refuse to allow a parent who, by agreement or otherwise, has transferred or relinquished his right of custody of his child~~ren~~, to reclaim the child from those to whom it has been surrendered, where the latter have had the custody for a considerable time and there has grown up a reciprocal affection between them and the child so that such condition of affairs cannot be disturbed by a forced separation without risking the happiness and best welfare of the child.

A careful consideration of the record in the instant case, leads to but one conclusion and that is that the decree appealed from is clearly against the manifest weight of the evidence. It is conceded that these paternal grandparents have provided the children with a good home and given them excellent care; that these grandparents are worthy people and that the children have a sincere affection for them and they have a deep and abiding love for their grandchildren. As has been said in many cases the ties of blood should not be disregarded. Appellee is their mother but the present husband of appellee is an entire stranger to these children. Whether he will or will not become attached to them is not known. Appellee voluntarily consented, either from necessity or choice, that

they should be given to their paternal grandparents at a time when she was either unable or unwilling to give them a mother's care, and the fact remains that appellee has been separated from them for several years and that new interests and new affections have arisen during the meantime. No good reason appears why the decree of divorce which gave the custody of these two children to their paternal grandparents should have been modified so as to give the mother their custody. It was not shown that it was for the best interest of these children that their custody be transferred from their grandparents to their mother. Their best interests will best be served by leaving them with their paternal grandparents where they have been since December 31, 1943.

The order of the circuit court of Carroll County is therefore reversed and this cause is remanded to that court with directions to proceed in accordance with the views herein expressed.

Reversed and remanded with directions. .

Abstract

Gen. No. 10174

Agenda No. 11

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1947.

LENA RITTER, ADMINIS-
TRATRIX OF THE ESTATE
OF WILLIAM RITTER,
DECEASED

Plaintiff-Appellee

vs

WILLIAM NIEMAN

Defendant-Appellant

3321A. 283²

APPEAL FROM THE
CIRCUIT COURT OF
JO DAVIESS COUNTY

Dove, J.

Lena Ritter, Administratrix of the estate of William Ritter, deceased, brought this suit against William Nieman, to recover damages for the benefit of the widow and next of kin of the said William Ritter, deceased. The death of William Ritter was the result of a collision of an automobile in which Ritter was riding and a truck being driven by William Nieman on July 4, 1942.

The complaint consisted of two counts, the first charging ordinary negligence and the second wanton and wilful misconduct. At the first trial at the close of all the evidence the jury in obedience to a peremptory instruction returned a verdict on both counts finding the defendant not guilty. Judgment was rendered upon this verdict and the plaintiff

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corrective action taken to solve the problem. The results of the corrective action taken to solve the problem are as follows:

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appealed. This court, after reviewing the facts, concluded that the issues should have been submitted to a jury on both counts and therefore reversed ^{the} judgment and remanded the case to the circuit court of Jo Daviess County for a new trial. Ritter v. Nieman, 329 Ill. App. 163.

Upon the second trial the jury returned a general verdict in favor of the plaintiff for \$7500.00 and found by a special interrogatory that the defendant was not guilty of wilful and wanton misconduct. The trial court rendered judgment for the defendant on the second count of the complaint and after overruling defendant's motion for a new trial and for judgment notwithstanding the general verdict, rendered judgment in favor of the plaintiff and against the defendant for \$7500.00 and the record is again before us for review.

As the facts are quite fully set out in the former opinion there is no necessity of reciting them again. Briefly, however, they are that at about 6:15 A.M. July 4, 1942, William Ritter was riding to work in his own automobile sitting at the side of Chester Atz who was driving the car. Besides these two occupants of the front seat of the car, there were in the rear seat Glenn Smeck on the right side, George Sigafus in the middle, and his wife on his left and on the laps of Mr. and Mrs. Sigafus were their two children. These men were all employed at Savanna, Illinois in an ordnance plant, and, at the time of the occurrence in question, were enroute to work. The car, which was a Ford V-8 was proceeding in a southerly direction on a State Aid gravel road with a roadbed 20 feet wide. The distance from fence line to fence line is 75 feet. Coming into this preferred highway from the west was a narrow road on which the defendant had

lived for many years. There is no side road coming in from the east but there is a gate upon the east side opening into a private lane. Eight feet west of the west line of the gravel road was a large oak tree which stood exactly in the center of the east and west road, and to enter the north, and south highway there were lanes going to the right and left of this tree. If one should take the road to the south of the tree and continue eastward across the highway, he would be directly in front of this gate leading into this private lane on the east side of the state aid road and it was this lane which the defendant on the morning of the accident proposed to enter. Eight feet west of the tree was a "STOP" sign of the usual dimensions. The roadway of the intersecting highways was smooth and level. At the northwest corner of the intersection the fence rows were grown up with shrubbery and vegetation and obstructed the views of the occupants of both involved vehicles.

The car owned by plaintiff's intestate was travelling upon the right hand side of the gravelled portion of the State Aid road at a speed variously estimated at 35 to 45 miles per hour. Appellant had lived a quarter of a mile west of the intersection for many years and was thoroughly familiar with the intersection and its surroundings. Upon the occasion in question he was driving his Chevrolet truck and he testified that he stopped at the stop sign; looked in both directions and had a clear and unobstructed view to the north from 600 to 800 feet. He stated he did not see any cars coming from either direction. After stopping at the sign he started his truck, drove south of the oak tree and proceeded to cross the

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the State Aid road. He did not see the Ritter car until he hit it. Chester Atz, the driver of the Ritter car testified that as he approached the intersection he was looking straight ahead ~~of~~ ~~was~~ down the highway, observed the large oak tree but did not see any person or vehicle in or near the intersection. When his car had just about arrived at the intersection plaintiff's intestate shouted "there is a car" and the driver of the car then for the first time observed appellant's truck coming out of the side road south of the oak tree a few feet away. The front end of appellant's truck struck the right rear fender of the Ritter car causing it to skid down the road and roll over on its side and throwing plaintiff's intestate therefrom and causing injuries from which he died on July 8th, 1942.

The errors relied upon for reversal are that plaintiff's intestate was guilty of contributory negligence as a matter of law, that the agent of plaintiff's intestate was also guilty of contributory negligence as a matter of law and that the trial court erred in overruling defendant's motion for a directed verdict and erred in denying defendant's motion for judgment notwithstanding the verdict.

Counsel for appellant in support of these assignments insist that the testimony of the driver of the Ritter car "leaves no doubt but that he drove upon the assumption that because he was on a through road he had a right to go through regardless of who might be coming and under what circumstances" and call our attention to the concluding question propounded to him upon cross examination which was; "Before you entered that intersection, you didn't look to the right to see if a car might be coming or not?" To which the witness answered: "Not that I remember of."

We have carefully read all the evidence as abstracted in the abstract prepared by counsel for appellant and also in the additional abstract furnished us by counsel for appellee and have examined the several photographs therein found. From a consideration of all the testimony in the record we believe the jury were warranted in concluding that the driver of the latter car was proceeding down this preferred highway at a reasonable rate of speed, that he was looking down the road ahead of him and saw the intersection and the large oak tree therein, that he was not conversing with any of the other occupants of the car but was focusing all his attention on his driving and had his car under control and was doing all that could reasonably be expected of any driver. While it is true that one driving on a through road has a right to assume that his passage will not be impeded at intersections he will nevertheless be held to a reasonable degree of care in watching for other vehicles and to the exercise of such caution as is commensurate with reasonable prudence. (5 Am. Jur. 750, sec. 431.) In returning the verdict it did, the jury must have found from the evidence and under the instructions of the court that the driver of the Ritter car was in the exercise of the degree of care legally required of him and the determination of that question is peculiarly the province of the jury.

It is not contended that the trial court erred in its rulings upon the admission or rejection of evidence or that the jury was not properly instructed as to the principles of applicable law, nor is it insisted that the jury were not

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warranted in finding from the evidence the defendant guilty of negligence.

The trial court did not err in denying appellant's motion for a directed verdict or in overruling his motion for judgment notwithstanding the verdict.

Whether Chester Atz, the driver of the car or plaintiff's intestate were in the exercise of ordinary care at and just prior to the collision is, under all the authorities, a question of fact for the jury to pass upon. The evidence, in our opinion, abundantly sustains the verdict of the jury and the judgment rendered thereon must be affirmed.

Judgment affirmed.

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Abstract

332 I.A. 284

GEN. NO. 10178

AGENDA NO. 14

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A. D. 1947

HAROLD E. BAKER, MERLE H.
BAKER and HERMAN P. BAKER,
Co-Partners, doing business
under the firm name of
BAKER BROTHERS,
Plaintiffs-Appellants.

vs

RUSSELL E. PALMER and JESSIE
PALMER,
Defendants-Appellees

APPEAL FROM THE
CIRCUIT COURT OF
HENRY COUNTY

Dove, J.

On February 7, 1941 the plaintiffs, Harold E. Baker, Merle H. Baker and Herman P. Baker, building contractors doing business under the firm name of Baker Brothers, submitted a written proposal to the defendants, Russell Palmer and his wife, Jessie Palmer, to furnish material and labor and make certain repairs and improvements upon their dwelling on Division Street in the city of Kewanee, Illinois to cost \$1872.00. No painting was included in this estimate and no written plans or designs were submitted. The proposal provided, however, that all

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1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation. The investigator must also identify the objectives of the investigation and the methods to be used. The investigator must also identify the resources available for the investigation.

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work was to be done in a ~~workmanlike manner~~ ~~and~~ ~~xxxx~~
~~xxxx~~ ~~xxxx~~ ~~xxxx~~ ~~xxxx~~ The defendants accepted the proposal
and work was started in February or March 1941 and completed
in June of the same year. During this time additional work
and materials were furnished according to the plaintiffs
and after crediting the defendants with all payments made,
there remained a balance due from the defendants to the plain-
tiffs of \$623.00 and on March 29, 1943 plaintiffs filed this
suit to enforce their lien upon the premises.

The defendants answered and filed a counter-claim
in which they admitted many allegations of the complaint and
that defendants were indebted to the plaintiffs but insisted
that they were entitled to a credit of \$445.00 because plain-
tiffs had improperly constructed the fireplace and had made
excessive charges for paint and painting the kitchen and a
portion of the upstairs. After the issues had been made up
the cause was referred to the Master. After the evidence was
taken the Master recommended a decree in favor of the plain-
tiffs. Objections to the Master's report were heard and over-
ruled. These objections were ordered to stand as exceptions
and upon a hearing before the chancellor exceptions two and
seven were sustained and credits allowed the defendants in
the sum of \$405.50 leaving a balance of ~~\$417.50~~ ^{\$217.61} and interest
due plaintiffs. For this amount a decree was ~~rendered~~ ^{rendered} and
plaintiffs appeal.

The only errors relied upon for reversal are that
the chancellor erred in sustaining defendant's exceptions
two and seven to the Master's report and in decreeing that
defendant's only pay one-half the costs. The Master found

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that there was never any blue print, plan, diagram or dimensions for the chimney or fireplace, that the fireplace and chimney were laid out and built by an experienced mason; that the material and workmanship were first class; that one of the defendants was present from time to time as the chimney and fireplace were being constructed, that the opening in the fireplace was enlarged at the request of one of the defendants; that the evidence does disclose that the fireplace smokes but is conflicting as to the cause of the failure of the fireplace to properly function, that the agreement of the parties contained no guaranty that the fireplace would not smoke, that changes by enlarging the fireplace were made by the direction of the defendant and therefore any defect arising from the smoking of said fireplace cannot be charged by the owner to the plaintiffs. Defendant's second exception challenged these findings.

The chancellor sustained this exception and filed a written opinion giving his reasons therefor. He stated that the undisputed evidence shows that the opening of the fireplace as first constructed was nine inches by eleven inches, that defendants objected and plaintiffs rebuilt the opening; that a number of witnesses testified that they were present when it was attempted to build a fire in the fireplace and the great weight of the testimony makes the conclusion inescapable that the fireplace is not workable; that there was, in the record, ample evidence to establish at least three errors in design of the fireplace and the chancellor in his written opinion elaborates upon each of these errors, notes that one of plaintiffs' witnesses was in agreement with defendant's contention that the job was improperly done, finds that any one of these errors in design would diminish the efficiency of the operation of this fireplace and concludes that the presence of all three makes it

fireplace and concludes that the presence of all three makes it design would diminish the efficiency of the operation of this job was improperly done, finds that any one of these errors in witness was in agreement with defendant's contention that the crates upon each of these errors, noted that one of plaintiff's the fireplace and the chimney in its written opinion stip- ample evidence to establish at least three errors in design of the fireplace is now established; that there was, in the record, weight of the testimony makes the conclusion inescapable that was attempted to build a fire in the fireplace and the first a number of witnesses testified that there were persons when it defendant objected and plaintiff sought to open; that as first observed - and also noted by several others, that the unavailability of evidence there is a finding of the fireplace written opinion giving his reasons therefor. He stated that the defendant's second contention that there were three errors in design of the fireplace and the chimney in its written opinion stip- of said fireplace was not supported by a single witness. In the testimony of the defendant and a witness who testified that the working changes by suggesting that the fireplace was not properly built, that retained no quantity of the fireplace and would not smoke, that to properly function, it is the requirement of the parties con- is conflicting and the weight of the testimony of the fireplace that the evidence is established. The fireplace makes but place was suggested to the jury by one of the defendants; fireplace were being a fireplace, that the opening in the fire- defendants was present from time to time as the chimney and the material and workmanship were first class; and one of the chimneys were laid out and built by an experienced mason; that mention for the chimney or fireplace, that the fireplace and that there was never any blue print, plan, diagram or sketch

a foregone conclusion that the fireplace could not work. The chancellor found that the Master's findings pertaining to the fireplace were against the manifest weight of the evidence and held that the defendants failed to construct the fireplace in a good and workmanlike manner and as the only evidence as to damage was the testimony that it will cost \$270.00 to remedy the defects, the decree allowed defendants that amount on their counter-claim.

Counsel for appellants further contend that the chancellor erred in sustaining appellees seventh exception to the Master's report. This finding and exception had to do with the interior painting, it being contended by the appellants that the man who did the painting, Hippert, was an independent contractor employed by defendants and that they, the plaintiffs, advanced him ~~money~~ money as his work progressed at the request of the defendants and for that reason included it in their claim for a lien. Appellees insist that Mr. Hippert, the painter, was not in their employ, that his work was defective and that they are entitled to have the damage they sustained credited upon the amount remaining due the plaintiffs. The Master found that the interior painting was done by Eugene Hippert with whom defendants had entered into a contract; that plaintiffs had nothing to do with the quality of the painting or the manner with which the painting was done, that the painting was done by Hippert to whom plaintiffs advanced money at the request of the defendants, that the evidence does not disclose any substantial defects in the painting job. In sustaining this exception the chancellor said: "The evidence clearly establishes a defective paint job upstairs and an error in the kitchen. Responsibility for this depends upon whether the painter, Hippert, was an independent contractor or

an employee of the plaintiffs. The original proposal excluded painting but this does not prevent it being afterward added as an extra. There is no question that Hippert was on Baker's payroll, but Baker claims this was for the convenience of Palmer in making payments only. Palmer says Baker employed Hippert after securing Palmer's approval. The testimony of Hippert strongly corroborates Palmer. He says he does all of Baker's painting. As to conferring directly with Palmer on selection of materials, Hippert says this is customary, that on all of Baker's contracts, he, Hippert, consulted the owner on materials, not Baker. He also says 'I told Palmer it would go through Baker, that I worked for Baker. I reported things always right to the office immediately'. In view of the plain and consistent story told by Palmer, corroborated by Hippert and the inclusion of this item in plaintiff's lien as an extra, I do not feel the Master was justified in rejecting all these facts in favor of Plaintiff's theory, which seemed unlikely on its face. The testimony showed the nature of the defects upstairs quite plainly, and there is nothing to support the Master's finding that they were caused by defendant's method of removing old varnish. The evidence on damages shows the cost to remedy to be \$100.00 for paint and \$75.00 for paper. Since the defendant had several years use of the paper, which was not defective, only the cost of painting should now be allowed on the counter-claim and an additional credit of \$15.00 should be allowed for the kitchen error."

There is ample evidence in this record to sustain the chancellor's findings with reference to the fireplace and the painting. We have read the record and are convinced that he

an employee of the defendant. The original proposal excluded painting but this was not, however, it being afterwards added as an extra. There is no question that Hippen was on Baker's payroll, but Baker's claim that the knowledge of Hippen in working on the same work. Baker told Baker engaged Hippen after securing his approval. The testimony of Hippen strongly corroborates Baker's claim. He says he saw all of Baker's painting. He is confident, however, that Baker on selection of materials, and says this is material, that on all of Baker's contracts, he, Hippen, consulted the owner on materials, not Baker. He also says I told Baker it would go through Baker, that I worked for Baker. I reported things always right to the office immediately. The time of the trial and a defendant story told by Baker, corroborated by Hippen and the inclusion of this item in plaintiff's claim as an extra, I do not feel the Master was justified in rejecting all these facts in favor of plaintiff's theory, which seemed unlikely on the face. The best way shown the nature of the defense was that the claim, and that is nothing to support the defendant's finding that they were caused by defendant's alleged negligence. The evidence on damages shows, as it is found to be \$100.00 for paint and \$75.00 for paper. Since the defendant had several years use of the paper, which was not returned, only the cost of painting should now be allowed on the counter-claim and an additional credit of \$10.00 should be allowed for the kitchen expense.

There is ample evidence in this record to sustain the defendant's claim with reference to the time, place and the painting. We have read the record and are convinced that he

did not err in sustaining exceptions two and seven to the Master's report. His conclusions are not manifestly erroneous but are sustained by the evidence, therefore the decree should be affirmed.

It is finally insisted that the decree is erroneous in only awarding the plaintiffs one-half the costs. In this there was no error. The allowance or withholding of costs in equity is a matter of discretion. What was said in *Fleming v. Dillon*, 370 Ill. 325 is applicable here, (p. 333).

"One-half the costs were assessed against the defendants. The final contention is that no costs should have been taxed against the defendants. The awarding of costs depends largely upon the facts and circumstances of each case. In a court of chancery it is a matter of discretion with the court and that discretion will not be reviewed except for abuse. *Schroeder v. Smith*, 249 Ill. 574; 7 R.C.L. 783, 784."

The decree of the Circuit Court will be affirmed.

Decree affirmed.

did not err in excluding evidence in the case of
Master's report. It is a mere form of words and has no effect
but are sustained by the evidence, and the case is decided
in affirmance.

It is finally found that the action is erroneous
in only a part of the judgment and the case is decided
there and no error. The judgment is affirmed in part and
reversed in part. The case is decided in affirmance
v. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Herewith:

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4-47

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM
A. D. 1947

102 A

Term No. 47 M 8

MARGARET E. BYBEE,
Plaintiff-Appellant,
-vs-
CITY OF COLLINSVILLE, ILLINOIS,
CHARLES ITALIANO, Doing Business
as C & F FOOD MARKET, CHRIST
SCHAULAT, MARY O'CONNELL and
JULIA O'CONNELL,
Defendants-Appellees.)

3321A. 353

Appeal from the
Circuit Court of
Madison County,
Illinois.

Smith, J.

This is an appeal by the plaintiff-appellant, Margaret E. Bybee, from judgment rendered by the trial court in which motions for directed verdicts reserved at the trial and for judgments notwithstanding the verdicts were allowed in favor of the defendants-appellees, Christ Schaulat, Mary O'Connell and Julia O'Connell, and judgment in favor of appellees in bar of action and for costs of suit against plaintiff was rendered. Defendants' motions for new trial were allowed pursuant to Rule 22, to become effective in the event the judgment for defendants was set aside. Suit as to other defendants was dismissed.

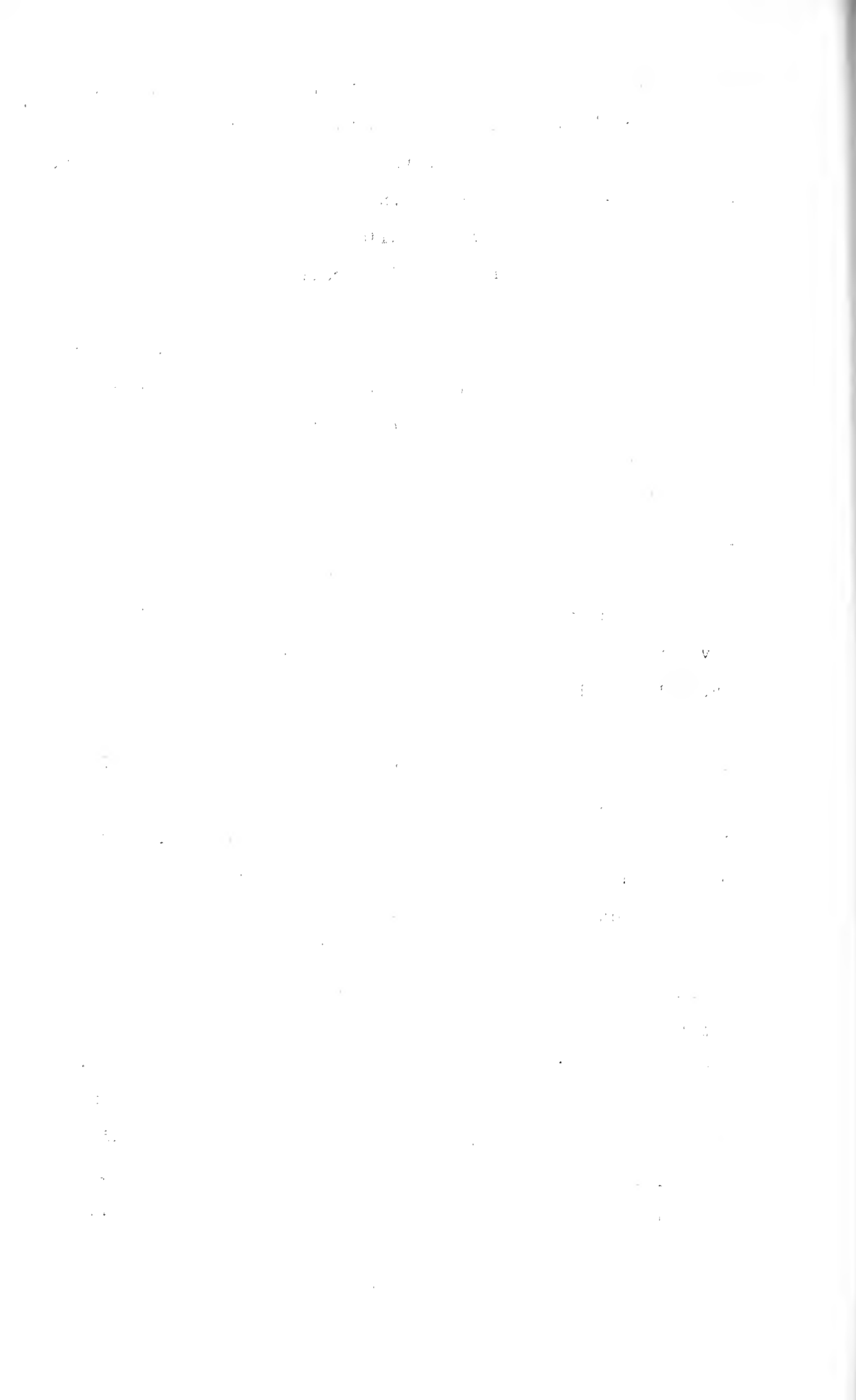
The plaintiff sought to recover damages for injuries resulting from a fall on the sidewalk in front of the C & F Market in Collinsville, Illinois, which building was owned by the defendants, Mary O'Connell and Julia O'Connell. The



complaint alleged in substance that on August 25, 1945, the defendants O'Connell were the owners of said building and that at their request and on their behalf, defendant Schaulat, while in the process of repairing certain plumbing, broke up a portion of the sidewalk and allowed it to be and remain in a bad and unsafe condition, and to remain broken, uneven, cracked and lower than the level of the other portions next thereto, and permitted such condition to remain unguarded and without warnings thereof, which condition was known by each of defendants, or by the exercise of due care and diligence each of them could or should have had notice thereof and that the plaintiff, while exercising due care for her own safety, on August 25, 1945, was caused to fall by the aforesaid condition of said premises while she was walking on and over same for which she asked judgment. The jury returned a verdict in favor of plaintiff for the sum of \$7,500.00, against the defendants O'Connell and Schaulat.

After the introduction of the plaintiff's evidence the defendants' motions for directed verdict were refused and following the presentation of all of the evidence they were renewed and the court reserved ruling on them. Following the verdict by the jury in favor of the plaintiff, the defendants' motions for judgment notwithstanding the verdict were allowed, after due consideration by the court.

The evidence shows that on July 10th and 11th, 1945, the defendants O'Connell had the defendant Schaulat repair plumbing leading to their building that necessitated breaking the public sidewalk in front of their building and digging a hole 4 feet north and south by $2\frac{1}{2}$ feet east and west, 3 feet deep and located 1 foot from the curb. The hole was filled, with the finer particles being placed on top, and puddled with water. When



the work was completed the hole was level with the sidewalk at the edges and an inch higher in the center.

Plaintiff, a married woman, 57 years old, was in good health and on the 25th day of August, 1945, accompanied by her sister-in-law, Mrs. Stella Hults, walked east on Main Street in Collinsville, Illinois, on the sidewalk in front of the C & F Market. There were boxes of fruit and vegetables on the south side of the sidewalk and also next to the curb, which occupied about one-half of the 12 foot sidewalk. The plaintiff testified that she was walking between the rows of boxes, about 3 feet from the building or about 1 foot from the boxes of fruit on her right and her sister-in-law was on her left and that they were passing other pedestrians, when her right foot went down lower than the sidewalk and she fell. The plaintiff did not see any hole or depression when she fell. Mrs. Hults helped the plaintiff into the C & F Market and later she walked to the doctor's office with the plaintiff. Mrs. Hults did not observe a depression in the sidewalk at the time the plaintiff fell but looked at it later and testified that the broken area in the sidewalk lacked about an inch of being level with the sidewalk and that the plaintiff fell inside the broken space. The plaintiff's husband testified that he examined the sidewalk where his wife fell and that there was a depression about $1\frac{1}{2}$ inches deep. Charles Italiano, who operated the C & F Market, was a witness for the plaintiff and he testified the broken area in the sidewalk was level with the sidewalk. The defendant Schaulat and two of his employees, who worked on the job, testified that they saw the place frequently, from the day it was broken up until and on the day the plaintiff fell, and that it was level with the sidewalk at all times.

It had rained the day previous to the plaintiff's fall and also that day but the evidence failed to disclose that the broken area was muddy or soft at the time the plaintiff fell.

The principal issue in controversy is whether, or not, the broken area in the sidewalk was reasonably safe as a matter of law. If the facts of the case justify a holding in favor of the defendants on this issue the action of the trial court in entering judgment notwithstanding the verdict was proper.

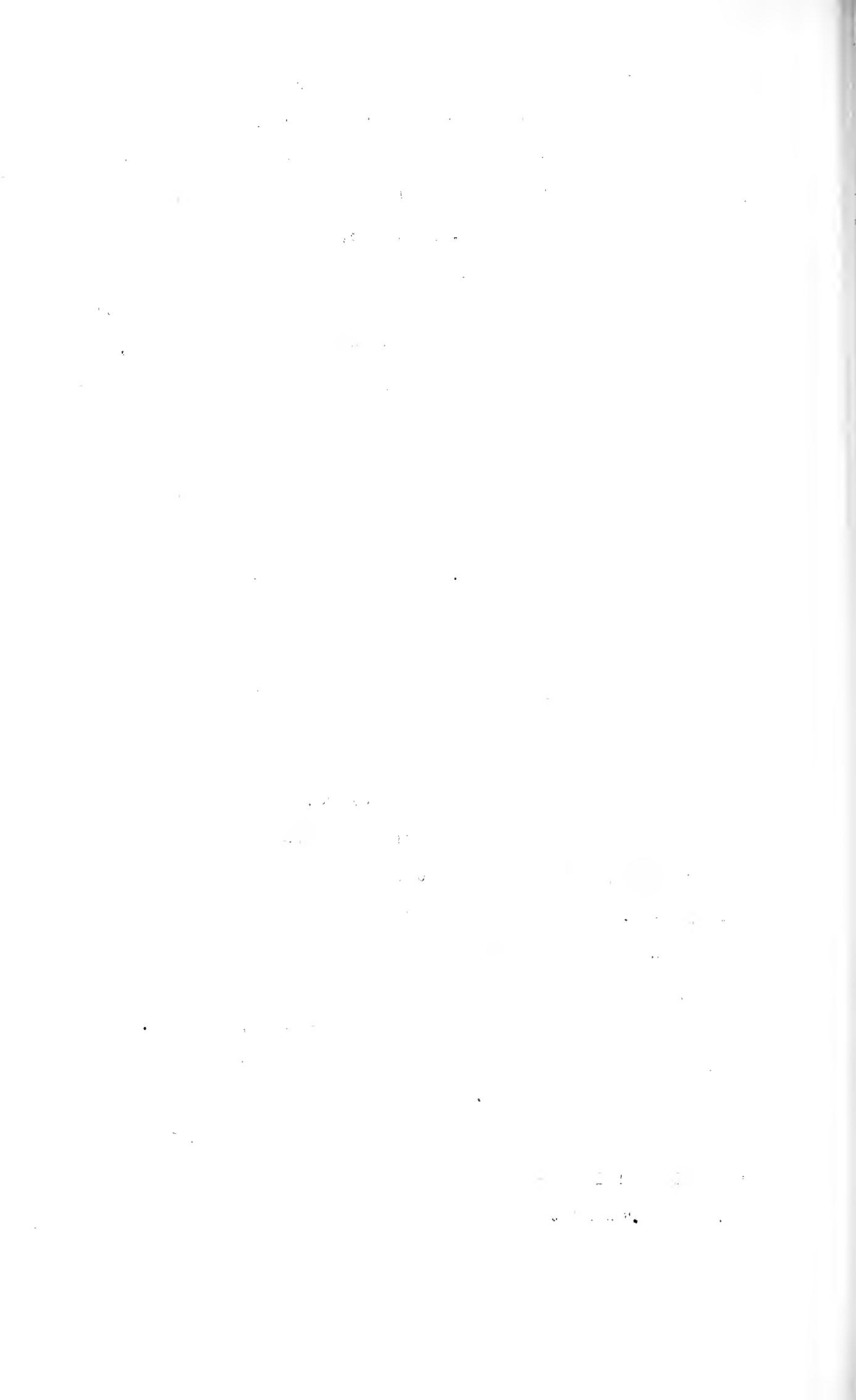
Under the Civil Practice Act a motion for judgment notwithstanding the verdict is granted when, under the same facts, the court would have directed the verdict. It is the well settled rule that the question presented on motion for a directed verdict is whether, when all of the evidence is considered with all reasonable inferences from it, in its aspect most favorable to the party against whom the motion is directed, there is a total failure to prove one or more of the necessary elements of the case. (Williams v. Consumers Co., 352 Ill. 51, p. 54.)

Considering the evidence before the trial court with this rule in mind, we are of the opinion that the broken area in the sidewalk was reasonable safe as a matter of law. The plaintiff's evidence, considered in a light most favorable to her, indicates that there was a depressed area in the sidewalk from about 1½ inches to smaller. One of the plaintiff's witnesses, Charles Italiano, testified that the broken area was level with the sidewalk. The defendant Schaulat and two of his employees testified that the broken area was level with the sidewalk when the hole was refilled and that it remained level up until the time of the plaintiff's fall.

The defendants were not guarantors of the safety of pedestrians on this sidewalk but were required only to exercise ordinary care in making and refilling the excavated area in the sidewalk. In the case of Powers v. City of East St. Louis, 161 Ill. App. 163, where there was a difference in elevation in the surface of the sidewalk of from 2 to 3 inches, the court in holding that the trial court erred in refusing to direct a verdict of not guilty said, at page 167, "No reasonable mind, it seems to us, could foresee that an injury would happen to a traveller thereon while exercising reasonable care. To hold that this sidewalk as constructed was not reasonably safe within the meaning of the law would be virtually to hold that all walks should be smooth and level. This would require of cities perfection in the construction of their walks and would make them virtually insurers against all damages; but the law of this state does not require such exactions, and our courts have repeatedly refused to hold cities and villages liable in such cases as this one.

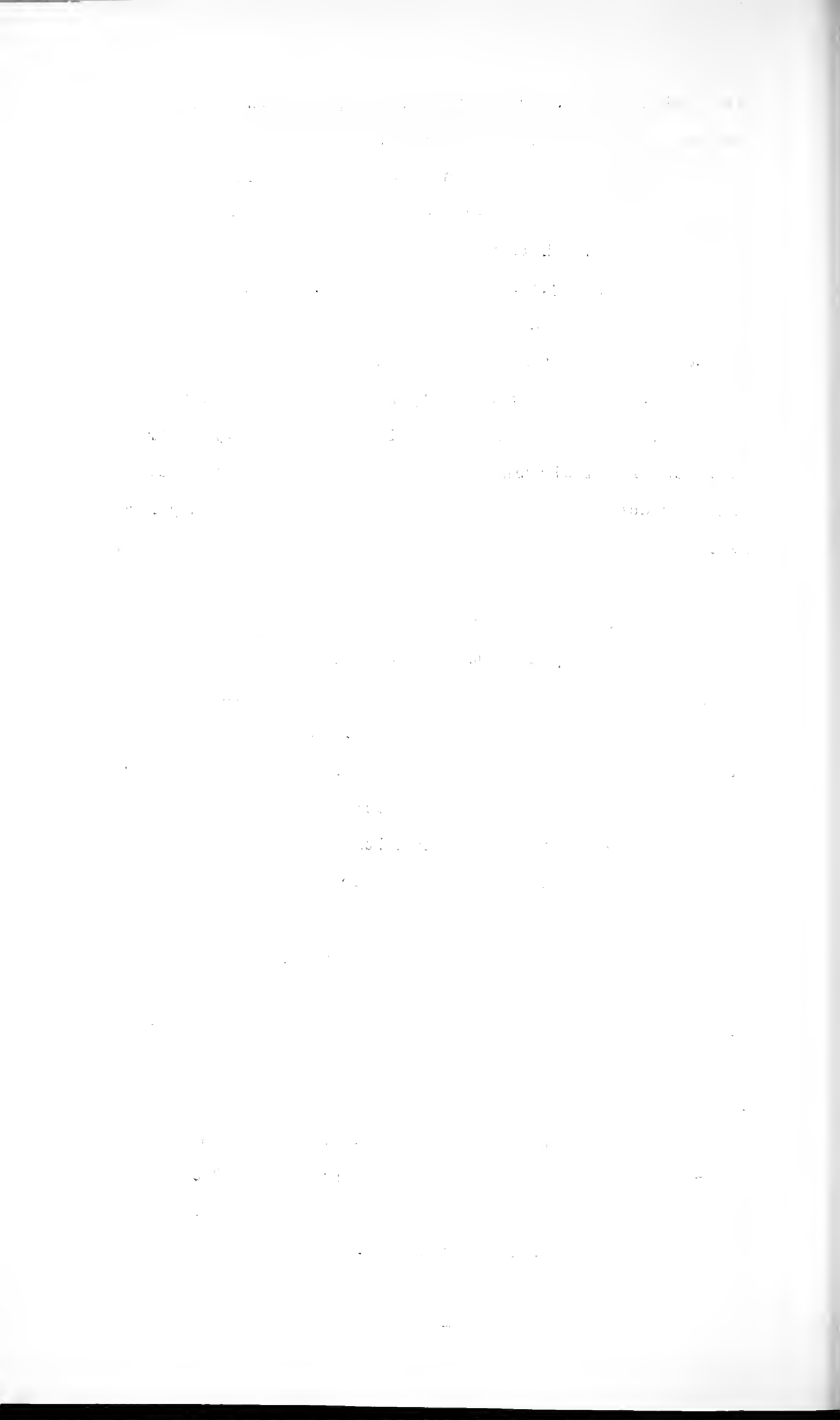
When a city or village has exercised reasonable care and prudence to construct its sidewalks in a reasonably safe condition for travelers using reasonable care for their safety, it has done all the law required of it in that regard. It is not required to foresee and provide against every possible danger or accident that may occur."

The case of Bleiman v. City of Chicago, 314 Ill. App. 471, is one of the most comprehensive decisions rendered on this subject. Here the difference in elevation in the sidewalk was caused by a $\frac{1}{2}$ inch steel plate. The court in holding that there was not actionable negligence, cited the Powers case and reviewed other leading cases. In



its decision the court quoted with approval the following language from the case of Beltz v. City of Yonkers, 148 N. Y. 67, in which there was a depression in the sidewalk of about 2½ inches: "With the greatest vigilance and the utmost foresight there will still be accidents for which no one, in any legal sense, is to blame. In many such cases, however, when an accident does happen the human mind can see and suggest many ways by which it could have been avoided. . . . Of course a city cannot be required to keep streets in such condition as to insure the safety of travelers under all circumstances. The measure of its duty in this respect is reasonable care and it is liable only for neglect to perform this duty. There are very few, if any, streets or highways that are or can be kept so absolutely safe and perfect as to preclude the possibility of accidents, and whether in any case the municipality has done its duty must be determined by the situation and what men knew about it before and not after the accident. When the defect is of such a character that reasonable and prudent men may reasonably differ as to whether an accident could or should have been reasonably anticipated from its existence or not, then the case is generally one for the jury; but when, as in this case, the defect is so slight that no careful or prudent man would reasonably anticipate any danger from its existence but, still, an accident happens which could have been guarded against by the exercise of extraordinary care and foresight, the question of the defendant's responsibility is one of law."

The foregoing cases and cases cited in them enunciate the rule followed by the courts of this state. The plaintiff cites no decision which indicates that the facts of this case should render the defendants liable.



In the case at bar the evidence concerning the difference in elevation between the refilled area and the adjacent sidewalk, considered with all reasonable inferences from it in favor of the plaintiff, established a depression which was so slight and inconsequential that the trial court was justified in holding it did not demonstrate actionable negligence.

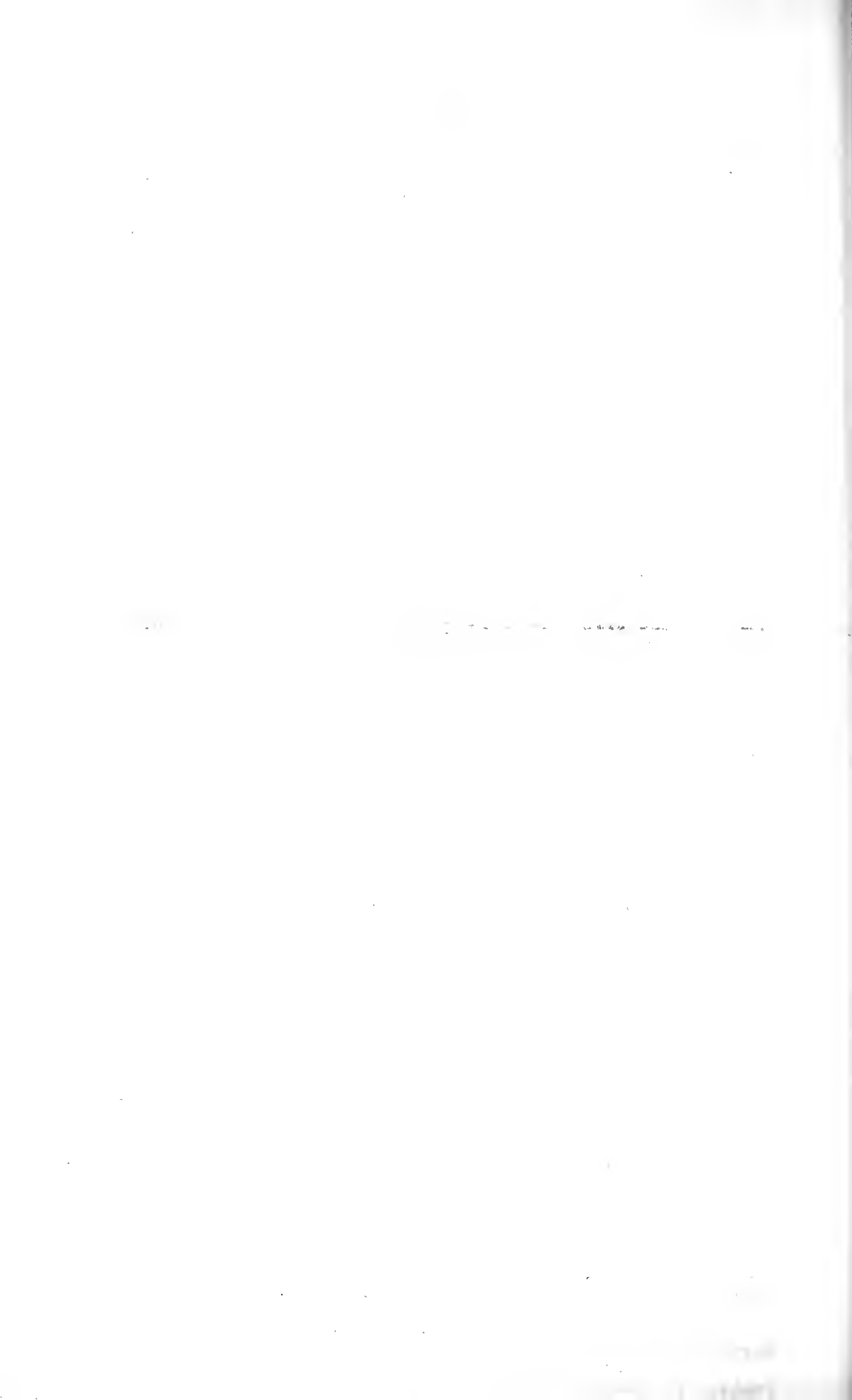
It also appears that the plaintiff failed to prove that her fall was caused by the broken area in the sidewalk. The plaintiff's own testimony indicated that she fell when walking approximately 3 feet from the building and this would have been at a point approximately 4 feet south of the broken area in the sidewalk. The only testimony which disputes the plaintiff's testimony is the statement by Mrs. Hults to the effect that the plaintiff fell inside of the broken area. However, this testimony is not convincing for the reason that Mrs. Hults did not observe any depression in the sidewalk at the time of the plaintiff's fall and first noticed it after the plaintiff had been taken into the C & F Market.

It is also noted that there was no evidence introduced by the plaintiff to show that any of the defendants had either actual, or constructive, notice of a difference in elevation in the sidewalk prior to the plaintiff's fall. It was necessary for the plaintiff to allege and prove the defendants, or one of them, knew of such alleged unsafe condition or that it existed for a period of time from which it might be inferred that the defendants, by exercising ordinary care, would have learned of it. (Davis v. Southside E. R. R., 292 Ill. 378, p. 386; Boender v. City of Harvey, 251 Ill. 228, p. 231.)

For reasons assigned above the judgment of the trial court is affirmed.

AFFIRMED.

Bartley, P. J. and Culbertson, J. Concur.



STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1947

Term No. 47 M 5

Agenda No. 4.

332 I.A. 37

LAWRENCEVILLE TWP. HIGH SCHOOL DISTRICT
NO. 71, Lawrence County, Illinois, and
T. L. ANDREWS, S. E. JONES, PEARLEY
WELLS, P. J. MacGREGOR, AND B. O. SUMNER,
as members of the Board of Education of
Lawrenceville Twp. High School Dist.
No. 71, Lawrence County, Illinois,

Petitioners-Appellants,

-vs-

ST. FRANCISVILLE COMM. HIGH SCHOOL DISTRICT
NO. 102, Lawrence County, Ill., R. M. IRE-
LAND, Twp. School Treasurer of Twp. 2 North,
Range 11 West of 2nd P.M., Lawrence County,
Ill., and R. F. SNIDER, P. R. WEADON, ROY
MARSH, E. J. BURNS and JOHN COLLISON, as
members of the Board of Education of St.
Francisville Comm. High School District No.
102, Lawrence County, Illinois,

Defendants-Appellees.

Appeal from the
Circuit Court of
Lawrence County,
Illinois.

CULBERTSON, J.

This is an appeal from the judgment of the Cir-
cuit Court of Lawrence County denying the Writ of Mandamus
requested by LAWRENCEVILLE TOWNSHIP HIGH SCHOOL DISTRICT
NO. 71 as against ST. FRANCISVILLE COMMUNITY HIGH SCHOOL
DISTRICT NO. 102, under Illinois Revised Statute, Chapter 122,
Section 15-6.

The Mandamus suit was commenced in the year 1938.
In the original petition Plaintiff was designated as LAWRENCE-
VILLE TOWNSHIP HIGH SCHOOL DISTRICT NO. 71, Lawrence County,
Illinois, and defendant was designated as ST. FRANCISVILLE

COMMUNITY HIGH SCHOOL DISTRICT NO. 102, Lawrence County, Illinois. In addition the Township Treasurer was made a party defendant. Neither the Board of Education nor the members thereof were made parties to the original petition.

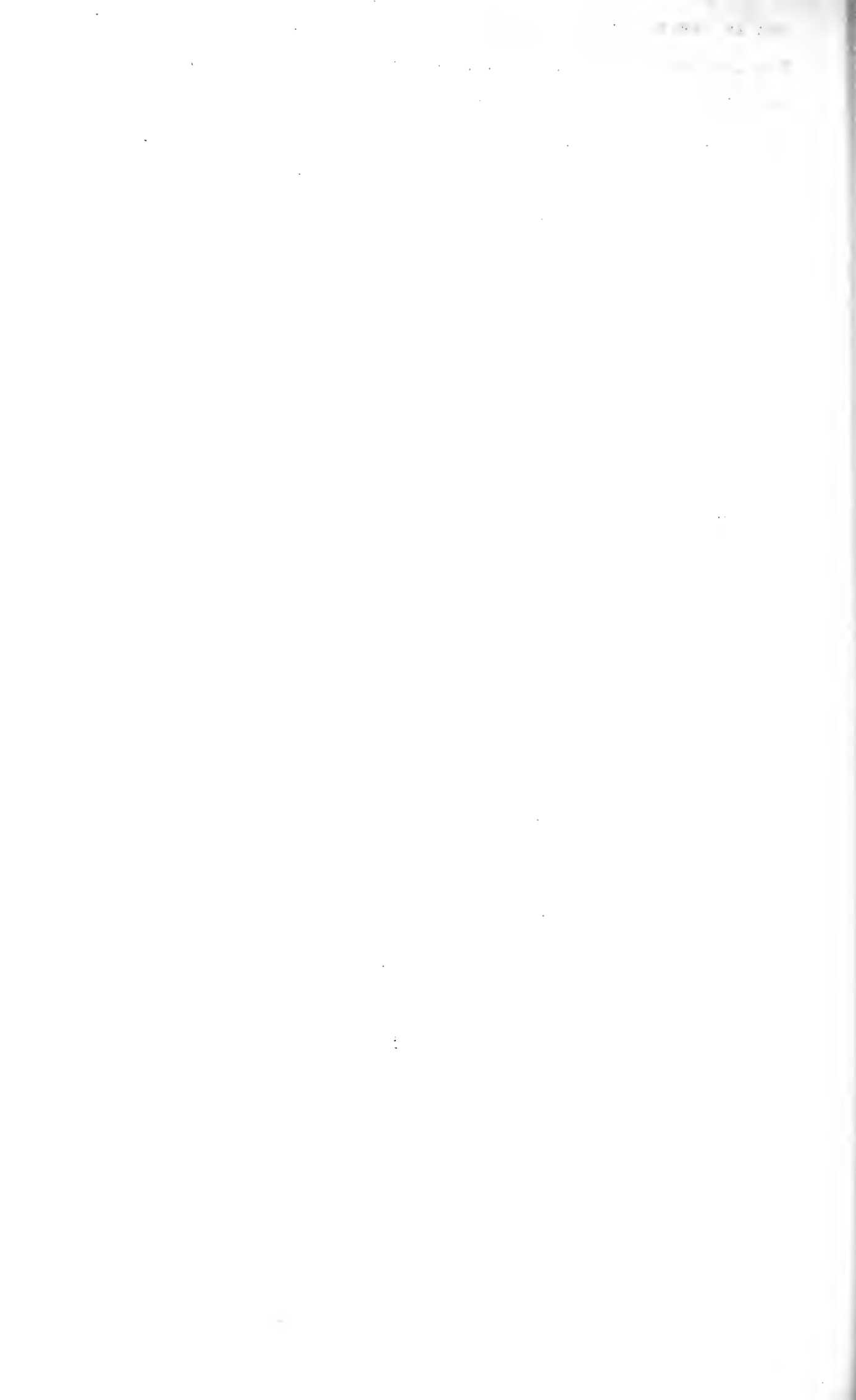
The summons issued after the filing of the petition was directed not against the High School District, but as against certain individuals as members of the Board of Education of such district. An Amended Petition was filed in the same year. The LAWRENCEVILLE TOWNSHIP HIGH SCHOOL DISTRICT NO. 71 was not included as a party plaintiff in this petition, and the ST. FRANCISVILLE COMMUNITY HIGH SCHOOL DISTRICT NO. 102 was not included as a party defendant. Certain individuals as members of the Board of Education under the LAWRENCEVILLE DISTRICT were designated as plaintiffs, and certain individuals as members of the Board of Education of the ST. FRANCISVILLE DISTRICT were designated as defendants. The Township Treasurer was again included as a party defendant.

Thereafter, the members of the Board of Education and Township Treasurer filed their answer to the amended petition. The original judgment was entered in the matter of the suit commenced by T. L. ANDREWS and others as members of the Board of Education of LAWRENCEVILLE TOWNSHIP HIGH SCHOOL DISTRICT NO. 71 as against R. S. SNIDER and others as members of the Board of Education of ST. FRANCISVILLE COMMUNITY HIGH SCHOOL DISTRICT NO. 102, and as against the Township School Treasurer. As pointed out above, the St. Francisville Community High School District was not made a party. During the course of the litigation, however, it was agreed by the parties then in the cause that a juror be withdrawn and that a judgment be entered against the defendants

and in favor of the plaintiffs in the sum of \$1,700.00. The judgment which was actually entered, however, provided as follows: "Thereupon, it is considered by the Court that the plaintiff, said LAWRENCEVILLE TOWNSHIP HIGH SCHOOL DISTRICT NO. 71, **** have and recover of and from the defendant, ST. FRANCISVILLE COMMUNITY HIGH SCHOOL DISTRICT NO. 102, **** the sum of \$1,700.00 and cost of suit". The judgment as entered was entered in favor of a party which was not at the time a plaintiff in the suit, and as against a party not then a defendant in the suit. The Board of Education and School District are separate and distinct corporate entities.

It is principally contended by the Petitioners that a judgment cannot be questioned in a collateral proceeding where the Court has jurisdiction of the parties and the subject matter of the suit, where its judgment, although irregular in form, or erroneous, is conclusive; that where the only party in interest is actually served with process even though under a wrong name, it will be concluded by the judgment or decree rendered the same as if it were correctly described, and that if defendants were sued by the wrong name they should have taken advantage of it by a Plea of Misnomer. The Court below denied the request of petitioners by motion to amend the petition by adding certain undesignated new parties plaintiff and defendant, and entered judgment denying the Writ of Mandamus, which sought to compel the defendant, Board of Education, to pay the judgment or levy a tax to pay the same.

Appellant's contention is substantially that where a party is sued by a wrong name and permits a judgment to be taken against him by such name, the party intended to be named in the judgment is affected thereby as though he were properly named therein, and that he must take advantage of



such misnomer by a plea in the nature of a Plea of Abatement in such suit, and that if he does not he will be concluded to the same extent as if he were described by his true name.

Illinois Courts have determined that a School District and Board of Education are separate entities (McCURDY vs. BOARD OF EDUCATION, 359 Ill. 188), and a suit against the Board of Education and service of process upon it is not sufficient to bring the School District before the Court. Lack of jurisdiction of a party against whom the judgment is rendered, renders the judgment void (WALKER vs. COOK, 294 Ill. 294). Plaintiff in a mandamus suit must show a clear and indisputable legal right to the Writ (PEOPLE vs. BLAIR, 292 Ill. 139; QUERNHEIM vs. ASSELMEIER, 296 Ill. 494).

It is significant that in this cause the sole party plaintiff was dropped and the original party defendant was, likewise, dropped from the case when the amended complaint was filed, and entirely different parties, both plaintiff and defendant, were substituted. There is no showing of authority for the issuance of summons as against members of the Board of Education. The suit was brought after the Practice Act was amended to provide that suit should be commenced by the filing of a complaint rather than by the issuance of summons. The original complaint did not include the individuals as parties defendant. While it is true that a party may be joined as plaintiff or defendant and that new parties may be added and parties misjoined may be dropped, it is necessary in order to add a party to either side of the cause that there be a plaintiff and defendant already in the cause with whom the new party may be joined, and if the sole defendant is dismissed, no case remains in the Court

and such defendant may not subsequently be again added as a party defendant to said cause, but plaintiff must begin a new action as to him (THOMPSON vs. OTIS, 285 Ill. App. 523).

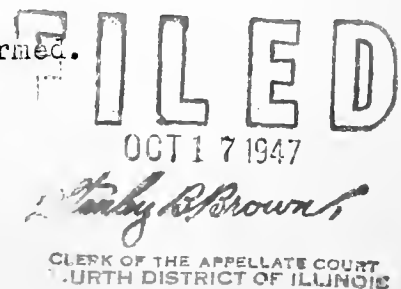
It is, therefore, clear that the Court below properly denied the Writ of Mandamus. As stated by our Supreme Court, the omission of a necessary party to a Petition for Mandamus, which omission appears on the face of the record, requires the reversal by the Supreme Court of its own motion of a judgment awarding the Writ even though no plea based on such omission was filed and no objection is made by either party calling attention to the omission (POWELL vs. PEOPLE, 214 Ill. 475). In the same case the Supreme Court, likewise, pointed out that where a person is shown to be within the jurisdiction of the Court and is shown to have a legal interest which will be collaterally determined by the judgment as rendered as requested by the petition, the Court is without jurisdiction to adjudicate the cause until such person has been made a party. It is thus clear that the judgment itself was void and the parties now seeking to enforce the same as members of the Board of Education are separate and distinct from the parties to whom the supposed judgment was awarded and the parties against whom the Writ is requested are separate and distinct from the parties defendant against whom the judgment was entered. The parties against whom the judgment was entered are not presently involved in this proceeding inasmuch as they are not included in the amended petition.

The action of the Circuit Court of Lawrence County in denying the Writ of Mandamus and in denying the petitioner's Motion to amend by adding new parties plaintiff and defendant was proper under the law and should be affirmed.

Judgment affirmed.

Justices Bartley and Smith concur.

Abstract.





IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, 1947

Abstract

ALBERT H. HANNEKEN,

Plaintiff-Appellee,

vs

JOSEPH M. EICHLER, CORINNE MILLER,
and JENNIE EICHLER,

Defendants-Appellants,

PHELCHNER SPOTTS and CITY OF DIXON,
ILLINOIS, a Municipal Corporation,

Defendants,

Appeal from

Circuit Court

Lee County.

332 1A - 372

Bristow, J.

This is an appeal by the defendants-appellants, Joseph M. Eichler, Corinne Miller, and Jennie Eichler, from a judgment entered against them in the Circuit Court of Lee County in the sum of \$5400 and costs. A similar judgment was entered against the City of Dixon in the same action, but the City did not prosecute an appeal from the judgment entered against them. The suit was instituted by plaintiff-appellee, Albert H. Hanneken, against the present appellants, the City of Dixon and Phelchner Spotts who was dismissed from the cause by the plaintiff before the commencement of trial.

The plaintiff's complaint charges that the defendants were the owners of a certain building situated on Galena Avenue at one of the prominent business intersections in the City of Dixon; that they employed Phelchner Spotts to remove ashes from the basement of their premises, and do so by passing them through a coal hole which opens in the public sidewalk, and then into a truck to be hauled away; that the defendants negligently, through their agent

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Spotts, permitted the opening in the sidewalk to remain unguarded, and, as a consequence, plaintiff while walking upon the sidewalk, fell into the hole and received serious injuries.

The defendants-appellants by their answer aver that Spotts was an independent contractor, and, therefore, the doctrine of respondeat superior does not apply. They also claim that the plaintiff was guilty of contributory negligence as a matter of law, and, thus, should be barred from any recovery.

The accident which gave rise to this cause occurred on July 10, 1945 while Spotts was engaged in removing ashes from the premises in question. The plaintiff is a lawyer who has lived and practiced his profession in the City of Dixon for more than forty years. He is afflicted with what is commonly known as "club feet" and uses a cane. Early in the morning on the above date, he was walking to his office and was going north on Galena Avenue. As he was nearing the hole through which the ashes were being delivered, he turned to speak to a friend of several years, the County Clerk of Lee County, Sterling Schrock. And then, while looking away, he walked into the hole, fell several feet, causing the fracture of his left femur near the hip joint. The accident necessitated long hospitalization. Witnesses ~~from~~^{for} the defendant indicated that the aperture in question was guarded by baskets, one on the south and one on the north side of it. Testimony adduced on behalf of the plaintiff was to the contrary effect.

The first ground for reversal insisted upon by counsel for appellant lies in the contention that the plaintiff-appellee was guilty of contributory negligence as a matter of law, and, hence, the trial court erred (1) in overruling defendant's motion for a directed verdict, (2) in denying defendant's motion for judgment notwithstanding the verdict, (3) in entering judgment on the verdict, and (4) in denying defendant's motion for a new trial.

In support of this position the following cases are cited:

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C.M. & St. P.P. Ry. Co. v Halsey, 133 Ill. 248; Ill. Cent. Ry. Co. v Farral, 86 Ill. App. 436; Sauter v Hinde, 183 Ill. App. 413; Hogrefe v Johnson, 271 Ill. App. 469.

In neither the C.M. & St. P.P. Ry. Co. v Halsey, supra, nor the Ill. Cent. Ry. Co. v Farrell, supra, did the Court find on the facts that the evidence was sufficient to establish contributory negligence as a matter of law. This is so, even though the injured party in each of these cases was proceeding upon a place of known danger and could therefore be charged with a higher degree of alertness in the exercise of ordinary care for his personal safety than the plaintiff in the instant case, who was at the time of his injury, walking along a public sidewalk which he had a right to believe to be in a reasonably safe condition.

The case of C. M. & St. P. P. Ry Co. v Halsey, 133 Ill 248, involves an injury occurring to plaintiff's intestate who entered upon a railroad crossing and was struck and fatally injured by a train of the defendant railroad company. The precautions taken by an ordinary prudent man for his personal safety would of course be far greater in proceeding along and upon railroad tracks where he knew or had reason to know trains travelled at frequent intervals and high rates of speed, than would be the case if this same individual, in the use of ordinary care, were walking along a public sidewalk over which he had travelled without mishap for the past thirty-eight years.

Sauter v Hinde, et al. 183 Ill. App. 413, involves an injury received by a plaintiff in attempting to enter a totally dark building with which she was totally unfamiliar. The Court there did state that on the facts the plaintiff was guilty of contributory negligence as a matter of law, and that, consequently, the trial court had erred in not directing a verdict for the defendant. There it appeared that the plaintiff, after two unsuccessful attempts to discover the correct entrance and without being able to see, had rushed into a totally dark place. She did not stop to explore what

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lay ahead of her, and did not do any of those things which a reasonably prudent person would do before proceeding too far along a dark and strange passageway. Such a case is clearly distinguishable on the facts from the one now before this Court. In the case at bar, the evidence adduced on behalf of the plaintiff indicated that he received no intimation at all that the sidewalk along which he was proceeding was in anything other than a reasonably safe condition, until he actually started to fall into the open coal hole, and it was too late for him to avoid the injury received.

The case of Blumb v Getz , 366 Ill. 273, presented a situation wherein a pedestrian walked out onto the paved portion of a heavily travelled highway to retrieve a glove and was struck by a motor vehicle driven by the defendant. The Court there said: "If the automobile was far enough away at the time to have justified a person in the exercise of ordinary care to have acted as the plaintiff did, it would not necessarily indicate such a lack of care on the part of the plaintiff as would amount, in law, to negligence. The question of contributory negligence is one which is preeminently a fact for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as well as other questions in the case. As was stated in Thomas v Buchanan, 357 Ill. 270: 'The question of due care on the part of plaintiff's intestate is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference that may reasonably and legally be drawn therefrom, tends to show the exercise of due care on the part of the deceased. ' "

We find in the instant case sharp conflict in the testimony concerning the baskets allegedly placed by Spotts as a warning to pedestrians of the open grating. Spotts and his two employees

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stated that these baskets were properly in place. However, the plaintiff's testimony was that he did not strike a basket or any other obstacle prior to falling in the hole, and this testimony is further supported by plaintiff's witnesses, Shrock and Burmeister, who each testify that they did not observe baskets guarding the hole. It is certainly within the realm of conceivability that a jury might logically give more credence to the plaintiff's testimony supported by two disinterested witnesses than they would place in that of Spotts and his two employees.

We are of the opinion that whether or not the plaintiff was guilty of contributory negligence at and immediately prior to the time of his accident was clearly a question of fact for the jury to determine.

The evidence shows, and it is admitted by both plaintiff and defendant, that Spotts, the individual who was employed to remove the ashes from the basement of the defendant's building, held the position of an independent contractor. This raises the question as to whether or not the doctrine of Respondeat Superior can be invoked for the purpose of absolving the defendant owner of the building from any liability for acts committed by Spotts. The record would indicate that the owners of the building and Spotts, mutually understood the procedure to be followed in removing the ashes. On the day of the accident, approximately two hours before the plaintiff received his injury, the defendant Eichler had observed the manner in which Spotts was removing the ashes from the opening in the sidewalk, and he, Eichler, had made no comment or protest concerning the manner in which the operation was being performed. The evidence further shows that they had been removed in precisely the same manner for many years previous.

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Appellant argues that even though they might have known of the manner in which Spotts intended to accomplish his work, still there can be no liability on their part due to the fact that the removal of ashes is not an inherently dangerous task and does not fall within the exception to the general principle announced in the case of Macer v O'Brien, 356 Ill. 486 involving the use of heavy wrecking machinery in a crowded residential area or the case of the City of Chicago v Murdock, 212 Ill. 9, involving the use of dynamite in construction of a tunnel under an urban community. The question as to what type of work will be declared inherently dangerous in order to render an owner liable in spite of the employment by him of an independent contractor, has received wide attention by the courts. It would necessarily require a long and detailed discussion in order to treat fully the many decisions bearing upon this subject.

We are of the view that the holding in the case of Andronick v Daniszewski, 268 Ill. App. 543, announces the rule which is applicable to the instant case. There the court was considering a suit against an abutting property owner for injuries caused by being hit with a chisel being used on some scaffolding which was on the street. It was alleged that the work was inherently dangerous and in passing on this phase of the case the court said: "When a person employs a contractor to do work in a place where the public are in a habit of passing, which work will, unless precautions are taken, cause danger to the public an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and if necessary precautions are not taken he cannot escape liability by seeking to throw blame on the contractor."

Ordinarily the owner of a building can be assumed to be a financially responsible person, while the same is not so generally true of independent contractors, and public policy would be strongly

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in favor of not allowing such an owner to evade all liability for injuries to persons passing along the public sidewalk by simply delegating his responsibility to an independent contractor.

Counsel for appellants object to Instruction No. 7 given on behalf of the plaintiff and contend that this instruction is so prejudicial as to warrant a reversal. The instruction complained of is as follows: "The court instructs the jury that a pedestrian upon a sidewalk may assume that the same is in a reasonably safe condition for traveling. He is not absolutely bound to keep his eyes constantly fixed on the sidewalk in search of possible holes or other obstructions or defects therein. And while it is the law that a person passing along a sidewalk in a city is required to use ordinary and reasonable care to avoid danger, what is such care depends upon the circumstances of each particular case, and that is a question for the jury to decide in this case. You are further instructed that if you believe from the evidence that the plaintiff, Albert H. Hanneken, in this case, turned while walking along the street to speak to someone, that in itself is not necessarily contributory negligence, or want of ordinary and reasonable diligence or care for his own safety."

The cases are numerous and uniformly hold that the question of what a reasonable and prudent man would do for his own safety under a particular set of circumstances must be left to the jury as one of fact, and that it is prejudicial error to instruct the jury that a certain set of facts constitute or do not constitute negligence if negligence has not been shown as a matter of law. Conklin Construction Co. v Walsh, 131 Ill. App. 609; Chicago & A.R.Co. v Anderson, 166 Ill. 572; West Chicago St. R. Co. v Luka, 72 Ill. App. 60; Chicago, B. & Q. Co. v Dougherty, 12 Ill. App. 181; Pennsylvania Company v McCaffrey, 173 Ill. 169; West Chicago Street Ry. Co. v Callow, 102 Ill. App. 323; North Chicago Street Ry. Co. v Williams, 140 Ill. 275.

It is the duty of the State to protect the rights of its citizens and to maintain the peace and order of the State. The State has the right to regulate the conduct of its citizens and to enforce the laws of the State.

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In the case of Lindberg v Chicago City Railroad Co., 83 Ill. App. 433, the court had before it a very similar instruction to the one herein question, to wit: "2. The court instructs the jury that even if you believe from the evidence that the plaintiff attempted to board the car in question while the car was in motion, that fact, if it be a fact, does not necessarily charge the plaintiff with contributory negligence as a matter of law. The question is still for the jury, whether, in view of that fact and of all the other facts and circumstances of the case, the plaintiff was or was not exercising ordinary care, under the circumstances for his own safety." The court there said, "It presents a correct statement of the law but is argumentative. It undertakes to tell the jury what is not 'necessarily' and 'as a matter of law' negligence. It is calculated to impress the jury with an argument that the very fact most relied upon by the defendant as constituting contributory negligence need not be so considered by them. It is undoubtedly a correct proposition that the jury might have determined that this fact did not constitute contributory negligence, but they should have been left to reach such a conclusion, if at all, by their own determination of what did, under the circumstances, constitute ordinary care. The majority of the court are of the opinion that the giving of the second of the foregoing instructions in a case where the evidence is so conflicting requires a reversal of judgment."

One of the principal defenses relied upon by the defendant in this case was that plaintiff while looking away walked into the hole, and that by so doing was guilty of such lack of care for his own safety that it was violative of his right to recovery. This was a critical and important issue and upon this subject it was imperative that instruction be accurate and free of prejudicial implication. Edwall v Chicago R. I. & P. Ry. Co., 208 Ill. App. 489; Chicago & A.R. Co. v Gore, 92 Ill. App. 418; Tri-City Ry. Co. v Killeen, 92 Ill. App. 57;

In the case of the 1911-12 season, the total catch was 1,100 tons.

The 1912-13 season was a record for the fishery, with a total catch of 1,200 tons.

The 1913-14 season was also a good one, with a total catch of 1,100 tons.

The 1914-15 season was a poor one, with a total catch of only 800 tons.

The 1915-16 season was a good one, with a total catch of 1,100 tons.

The 1916-17 season was a poor one, with a total catch of only 800 tons.

The 1917-18 season was a good one, with a total catch of 1,100 tons.

The 1918-19 season was a poor one, with a total catch of only 800 tons.

The 1919-20 season was a good one, with a total catch of 1,100 tons.

The 1920-21 season was a poor one, with a total catch of only 800 tons.

The 1921-22 season was a good one, with a total catch of 1,100 tons.

The 1922-23 season was a poor one, with a total catch of only 800 tons.

The 1923-24 season was a good one, with a total catch of 1,100 tons.

The 1924-25 season was a poor one, with a total catch of only 800 tons.

The 1925-26 season was a good one, with a total catch of 1,100 tons.

The 1926-27 season was a poor one, with a total catch of only 800 tons.

The 1927-28 season was a good one, with a total catch of 1,100 tons.

The 1928-29 season was a poor one, with a total catch of only 800 tons.

The 1929-30 season was a good one, with a total catch of 1,100 tons.

The 1930-31 season was a poor one, with a total catch of only 800 tons.

The 1931-32 season was a good one, with a total catch of 1,100 tons.

The 1932-33 season was a poor one, with a total catch of only 800 tons.

The 1933-34 season was a good one, with a total catch of 1,100 tons.

The 1934-35 season was a poor one, with a total catch of only 800 tons.

The 1935-36 season was a good one, with a total catch of 1,100 tons.

The 1936-37 season was a poor one, with a total catch of only 800 tons.

The 1937-38 season was a good one, with a total catch of 1,100 tons.

The 1938-39 season was a poor one, with a total catch of only 800 tons.

The 1939-40 season was a good one, with a total catch of 1,100 tons.

The 1940-41 season was a poor one, with a total catch of only 800 tons.

The 1941-42 season was a good one, with a total catch of 1,100 tons.

The 1942-43 season was a poor one, with a total catch of only 800 tons.

The 1943-44 season was a good one, with a total catch of 1,100 tons.

The 1944-45 season was a poor one, with a total catch of only 800 tons.

The 1945-46 season was a good one, with a total catch of 1,100 tons.

The 1946-47 season was a poor one, with a total catch of only 800 tons.

The 1947-48 season was a good one, with a total catch of 1,100 tons.

Illinois Iron & Metal Co. v Weber, 89 Ill. App. 368; Toledo, P. & W. Ry. Co. v Parker, 73 Ill. 526; Pittsburgh C. C. & St. L. Ry. Co. v Banfill, 216 Ill. 553.

We do not concur with the plaintiff's argument that the defect of instruction No. 7 was cured by defendant's instructions Nos. 25 and 26. They are not open to objection. We are of the opinion that the giving of Instruction No. 7 was reversible error and entitle the defendant to a new trial.

REVERSED AND REMENDED.

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Abstract

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

OCTOBER TERM, A.D. 1947

General No. 9541

Agenda No. 4

332 I.A. - 38

Paul DeLattre,
Plaintiff-Appellee,

vs.

Hayes Freight Lines, Inc.,
a Corporation,
Defendant-Appellant.)

Appeal from

Circuit Court of

Sangamon County

Wheat, P. J.

Plaintiff-Appellee, Paul DeLattre, obtained a jury verdict, on which judgment was entered, in the sum of \$450.00, against defendant-appellant, Hayes Freight Lines, Inc., for damages growing out of the breaking of a printing press. The case was tried before the Hon. Lawrence E. Stone, whose death occurred before a ruling on a motion for judgment notwithstanding the verdict and a motion for new trial. The Hon. Clem Smith denied both of such motions, from which this appeal follows.

The complaint charges that plaintiff purchased a printing press September 27, 1945, from P. J. Valter; that plaintiff engaged the services of the defendant Hayes Freight Lines, Inc., to move such press from Norris City, Illinois, to Springfield, Illinois; that said defendant,

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Joan Dean

by some arrangement unknown to plaintiff, engaged the services of defendant, C. H. Larkin Construction Co., to assist in the loading of such press on the truck of the defendant freight line; that defendants, while attempting to load such press upon the truck of the defendant Hayes Freight Lines, Inc., dropped such press, breaking and damaging it beyond repair. As damages, plaintiff charged that the press was damaged beyond repair and that he had lost money because of not having such press. Subsequently, on plaintiff's motion, the defendant C. H. Larkin Construction Co. was dismissed from the case.

Among the assignments of error, it is charged that the damages assessed by the jury in the sum of \$450.00 were not proved by a preponderance of the evidence, and that such verdict was contrary to the manifest weight of the evidence.

The entire evidence relating to damages is substantially as follows: Plaintiff testified that he paid \$175.00 for the press; that he was not present when the press was dropped and broken; that in his opinion the press could not have been repaired and put in operation again; that the rollers could not be welded but would have to be replaced; that in the use of such press he could have put out a thousand impressions per hour which could be sold for \$2.00; that he should make a net profit of \$15.00 per day from such operation. On cross examination, he stated he never saw the press after it was broken; that of his own knowledge he did not know what was broken; that he never attempted to have the press repaired and did not make further attempts to have it moved to Springfield.

1. The first step is to identify the problem or question being asked.
 2. Next, we need to gather relevant information and data.
 3. Then, we analyze the information to determine the cause of the problem.
 4. After analysis, we develop a plan or solution to address the issue.
 5. Finally, we implement the solution and monitor its effectiveness.

From this testimony it does not appear to what extent the press had been damaged, whether the damages could have been repaired, and, if so, at what expense. Plaintiff never saw the press after it was dropped, and no other witness testified on the subject except defendant's truck driver, Earl Pickard, a witness for defendant. He stated that upon reaching Norris City, he parked his truck on the north side of the street; that on the south side, a winch truck was loading a press, and as he walked across the street, the press fell to the sidewalk. As to damage to the press, he said, "A leg or something broke off the printing press * * * something there was broken, I don't know whether it was the leg or not. * * *" Q. "And it was -- You could see enough broken parts you knew there was no need for you to haul it, was there?" A. "Yes, sir." This is not descriptive as to damages, it being obvious that a driver for a common carrier would not haul a press with unknown damages, which, as he contended, he had no part in causing.

As to damages for loss of use of the press, plaintiff did not testify that he had printing jobs to do requiring the use of the press, or that he suffered financial loss by reason of not having it, but merely that "You should make about \$15.00 a day."

This court is of the opinion that regardless of any alleged liability of defendant, the evidence as to damages was so insufficient as to have made it impossible for a jury to have made an estimate thereof. The verdict is clearly contrary to the manifest weight of the evidence as to damages.

1. The first part of the report
describes the general situation
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state of the economy.
It also mentions the
main problems which
the government is facing.
The second part of the report
deals with the
financial situation of the
country and the
state of the public
finances.

2. The third part of the report
describes the situation of the
different regions of the country
and the state of the economy
in each of them. It also
mentions the main problems
which the different regions
are facing. The fourth part
of the report deals with the
social situation of the country
and the state of the public
services. It also mentions
the main problems which
the government is facing in
this field.

3. The fifth part of the report
deals with the
state of the public
finances and the
state of the public
debt.

For the reason that a new trial is directed, it will be unnecessary for the court to consider the other assignments of error, except as to the ruling on the motion for judgment notwithstanding the verdict. The trial court did not err in denying such motion. This motion must be governed by the same rules as are applicable in passing upon a motion for a directed verdict, that is, if the plaintiff's evidence, with all reasonable presumptions and inferences to be drawn therefrom, viewed in the light most favorable to the plaintiff, tends to establish his case, the motion should be denied. The trial court did err, however, in denying the motion for new trial, for the reasons aforesaid.

The judgment of the trial court is reversed and the cause remanded for a new trial.

Reversed and remanded.

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Abstract

STATE OF ILLINOIS

APPELLATE COURT
THIRD DISTRICT

October Term, A.D. 1947.

332-4-38²

General No. 9546

Agenda No. 8

MARY ABERNATHY,

Appellant,

-vs-

IVA BENSLEY and CLARENCE
ABERNATHY,

Appellees.

Appeal from the
Circuit Court of
Coles County.

DADY, J.

This is an appeal by Mary Abernathy from two orders of the
Circuit Court of Coles County.

The transcript of the record on appeal, filed in this court,

Abstract

so far as we consider material, shows the following:

1. (a) On December 13, 1944, there was filed in the County Court by Iva Bensley and Clarence Abernathy, in the matter of the estate of Lydia Belle Abernathy, deceased, a verified petition which stated in substance: that they were heirs of decedent;^{that}/a report of appraisement filed in said estate, purporting to appraise certain personal property inventoried, and purporting to fix a child's award of \$1,000 to Mary Abernathy, did not fairly value the property therein described and appraised; that the child's award was excessive; that Mary Abernathy and Fred Abernathy had in their possession or had disposed of certain described personal property, belonging to said estate, and had failed and refused to deliver or account for the same, and that the inventory filed in said estate did not contain a full and complete inventory of all of the assets of the estate. The petition prayed that the appraisement bill and child's award be set aside and vacated, that new appraisers be appointed to appraise the personal property and fix and allow the child's award, and that the administrator and Mary Abernathy and Fred Abernathy be required to appear before the court for examination for the purpose of discovering assets.

(b) On April 4, 1945, the County Court entered an order finding and stating that "certain items of personal property, bank account

1. The first part of the report deals with the general situation of the country and the progress of the work during the year. It is divided into two main sections: the first section deals with the general situation and the second section deals with the progress of the work.

2. The second part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work in the field and the second section deals with the results of the work in the laboratory.

3. The third part of the report deals with the conclusions of the work during the year. It is divided into two main sections: the first section deals with the conclusions of the work in the field and the second section deals with the conclusions of the work in the laboratory.

4. The fourth part of the report deals with the recommendations of the work during the year. It is divided into two main sections: the first section deals with the recommendations of the work in the field and the second section deals with the recommendations of the work in the laboratory.

5. The fifth part of the report deals with the summary of the work during the year. It is divided into two main sections: the first section deals with the summary of the work in the field and the second section deals with the summary of the work in the laboratory.

6. The sixth part of the report deals with the appendix of the work during the year. It is divided into two main sections: the first section deals with the appendix of the work in the field and the second section deals with the appendix of the work in the laboratory.

7. The seventh part of the report deals with the bibliography of the work during the year. It is divided into two main sections: the first section deals with the bibliography of the work in the field and the second section deals with the bibliography of the work in the laboratory.

8. The eighth part of the report deals with the index of the work during the year. It is divided into two main sections: the first section deals with the index of the work in the field and the second section deals with the index of the work in the laboratory.

9. The ninth part of the report deals with the list of figures of the work during the year. It is divided into two main sections: the first section deals with the list of figures of the work in the field and the second section deals with the list of figures of the work in the laboratory.

10. The tenth part of the report deals with the list of tables of the work during the year. It is divided into two main sections: the first section deals with the list of tables of the work in the field and the second section deals with the list of tables of the work in the laboratory.

and automobile were partnership property, one-half belonging to estate and one-half belonging to Mary Abernathy, and Mary Abernathy, surviving partner, ordered to file a partnership inventory within twenty days. The question of child award held in abeyance as is also the question of reappraisal until after the partnership inventory is filed."

(c) Mary Abernathy duly perfected her appeal to the Circuit Court from such order of the County Court.

(d) On October 2, 1945, Iva Bensley and Clarence Abernathy moved the Circuit Court to dismiss such appeal on the ground that the appeal had not been taken from a final order, and no final order had been entered by the County Court, but merely an order finding that a partnership existed in certain personal property, and directing Mary Abernathy, as surviving partner, to file an inventory within twenty days.

(e) On October 8, 1945, the Circuit Court entered an order allowing the motion to dismiss the appeal "on the ground that such appeal was prematurely presented and without prejudice to appellant." The order stated that "the court grants appellant the right to perfect appeal when original petition has been fully heard and determined in the Probate Court."

2. (a) On November 10, 1945, Iva Bensley and Clarence Abernathy

and automobile were returned to the estate and one-half belonging to surviving partner. Personal effects and household furniture were also included in the inventory. The question of child support in the case was also included in the inventory. The inventory is filed.

(c) Why the estate was not included in the inventory.

Grant from the estate of the deceased.

(d) On October 1, 1915, the estate was included in the inventory.

On October 1, 1915, the estate was included in the inventory.

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On November 1, 1915, the estate was included in the inventory.

moved the County Court that an order be entered directing Mary Abernathy to appear and show cause why she should not be deemed in contempt for failure to file an inventory pursuant to the order so entered on April 4, 1945.

(b) On November 15, 1945, Mary Abernathy moved the County Court to stay further proceedings "until a hearing can be had on all other issues involved in the petition filed herein."

(c) On November 23, 1945, the County Court entered an order whereby Mary Abernathy was ordered to make a partnership inventory within ten days, and ordered that if such inventory was not so made a citation was to issue returnable instant. On November 23, 1945, Mary Abernathy perfected her appeal to the Circuit Court from such order of the County Court.

(d) On January 18, 1946, Mary Abernathy moved the Circuit Court to vacate the order of October 8, 1945, allowing a motion to dismiss "the appeal filed herein for the reason that petitioners (Clarence Abernathy and Iva Bensley) have failed and refused to proceed to try the issues raised in the original petition filed in the Probate Court, and that instead of proceeding to a hearing on all other issues stated in said original petition said petitioners have filed a petition for a citation and obtained an order directing Mary Abernathy to file a partnership inventory" * * * "which said

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... .. ACTI

EVERYTHING IS THE SAME AS IT WAS IN THE PAST

John Nelson "A" and "B" Thompson, Jr. and George A. Thompson, Jr. are the sons of George A. Thompson, Sr.

order deprives this defendant of her rights to any defense she may have in all the other issues raised in the said original petition."

(e) On July 3, 1946, Iva Bensley and Clarence Abernathy moved the Circuit Court that such last appeal be dismissed for the reason that said appeal was prematurely taken from an interlocutory order and not a final order, and "the questions raised upon this appeal are res adjudicata, having heretofore been determined by the order of the court heretofore entered in an appeal from the County Court" to the Circuit Court.

(f) On November 19, 1946, the Circuit Court entered an order denying the motion of Mary Abernathy to vacate the order of the Circuit Court entered on October 8, 1945, and on the same day the Circuit Court entered an order dismissing the last appeal filed by Mary Abernathy.

In this appeal Mary Abernathy is attempting to have reversed the two orders, so entered on November 19, 1946.

It is our opinion that the Circuit Court did not err in entering the order of November 19, 1946, denying the motion to vacate the order of October 8, 1945. No appeal was taken from such order, and no motion to vacate such order was made within the thirty days allowed by Section 50 (7) of the Practice Act.

As to the order of November 19, 1946, dismissing the last appeal

order given to defendant on November 1, 1944, and any defense and

may have in all the other cases before in the original decision."

(c) On July 3, 1944, the defendant, I have already moved

the Circuit Court that they should not be allowed to remain in the

that said order was not a final order, but a preliminary order

and not a final order, and that the defendant should be allowed to

are not admitted to the Circuit Court, and that the order

of the court should be set aside and a final order be entered

to the Circuit Court.

(d) On July 3, 1944, the defendant, I have already moved

denying the order of the Circuit Court, and that the defendant

Circuit Court should not be allowed to remain in the

Circuit Court, and that the defendant should be allowed to

by the Circuit Court.

In this case, the defendant, I have already moved

the two orders of the Circuit Court, and that the defendant

it is our opinion that the Circuit Court should not enter in

the order of the Circuit Court, and that the defendant

order of the Circuit Court, and that the defendant

and no motion for a writ of habeas corpus should be granted

allowed by the Circuit Court, and that the defendant

As to the order of the Circuit Court, I have already moved

to the Circuit Court, - we are not ignoring the fact that counsel for appellees have admittedly taken inconsistent positions.

On the first appeal they contended that the appeal was not taken from any final order of the County Court, and in so doing induced the Circuit Court to dismiss the appeal "on the ground that such appeal was prematurely presented and without prejudice to the appellant."

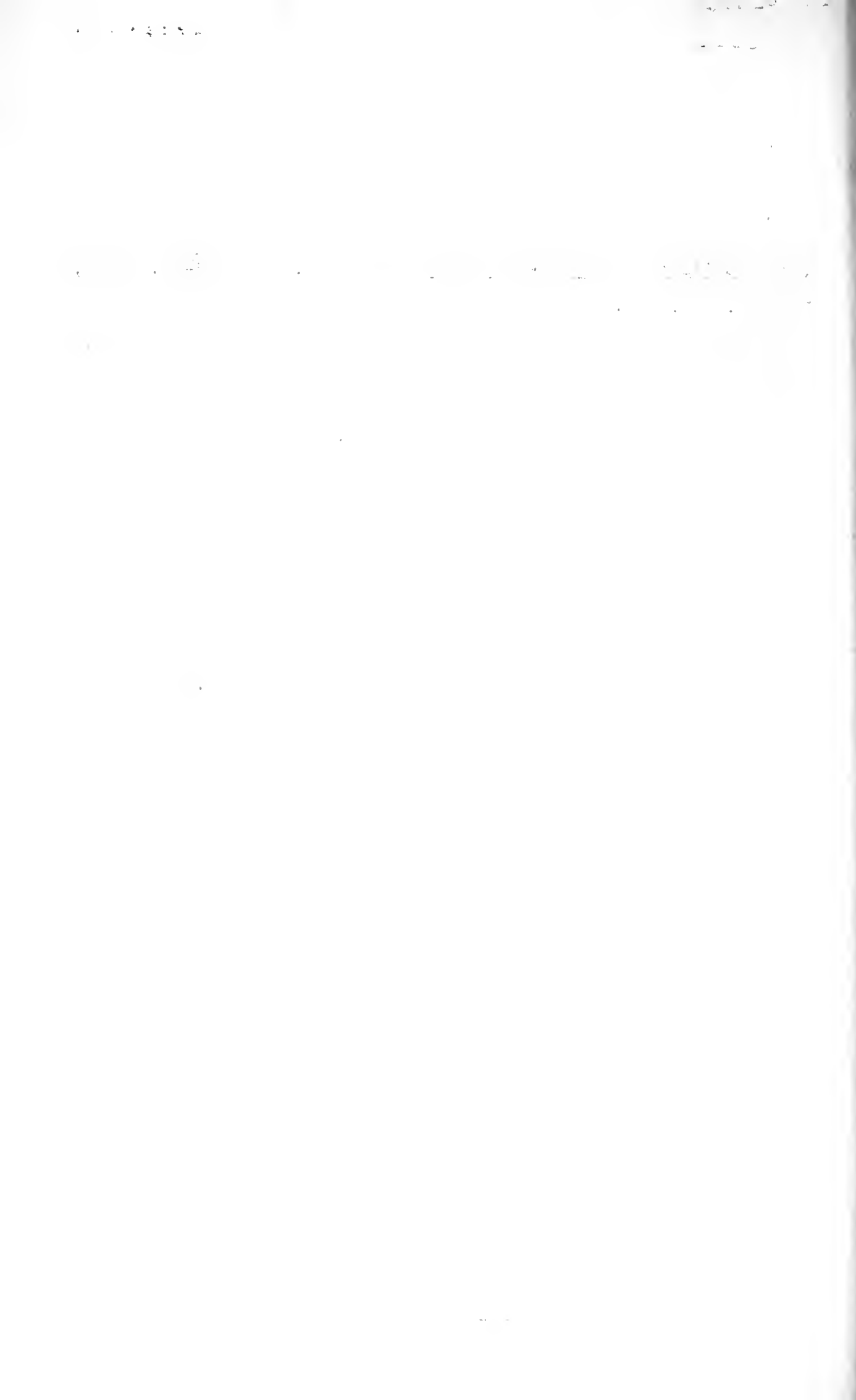
Thereafter the same counsel, in moving the Circuit Court to dismiss the last appeal, contended that the questions raised on such last appeal (including the question of a partnership) were res judicata because determined by the County Court order of April 4, 1945. In their brief they now state "That a partnership had already been determined, and that the determination became final upon appellant permitting the order (of October 8, 1945) to stand for over one year without taking an appeal." Such conduct cannot be approved and may act as an estoppel against the appellees when hereafter properly presented. (See Kellner v. Schmidt, 328 Ill. 426, 430.)

However, as the case is now presented it is our opinion that the last appeal to the Circuit Court was not from such an order of the County Court as was final and appealable. The order of the County Court of November 23rd appealed from was "simply an order directing an initiatory step, necessary to bring before the County Court a cause for disposition in that court, should be taken."

(See McCollister v. Greene County Bank, 171 Ill. 608; Lain^{ne} v. Thorn, 103 Ill. App. 215.)

The judgments of the Circuit Court consisting of the two orders of November 19, 1946, are therefore affirmed.

Affirmed.



331A-39

Agenda Number 3.

IN THE APPELLATE COURT
OF ILLINOIS
THIRD DISTRICT
OCTOBER TERM, A.D. 1947.

[illegible]

HAYES, J. :

This is an appeal from a judgment of the Circuit Court of Menard County. Defendant-Appellant failed to file notice of appeal in apt time but thereafter filed a petition for leave to appeal. We have granted the prayer of that petition.

Plaintiff, Ed. H. Johnson, employed as a hired man by defendant George T. Lukeman on the latter's farm injured his hand while attempting to remove an ear of corn from a corn picker owned by defendant and operated by plaintiff. Plaintiff filed suit against the defendant in the circuit court of Menard County. At the trial plaintiff filed an affidavit stating that the defendant was insured by the Illinois

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Agricultural Mutual Insurance Company; that this company was actually defending the suit; that the company did an extensive business in Menard County, had numerous policyholders, agents and employees in the county, and that plaintiff might be seriously prejudiced if his counsel were not permitted to inquire as to the financial interests of prospective jurors in this company on their voir dire. At a discussion in chambers between the Court and Counsel for both parties, defendant asked an opportunity to present counter-affidavits but his request was denied and the panel of jurors was interrogated by the court as to their interest in the insurance company. At the close of the trial the case was submitted to the jury who rendered a verdict for \$5,628.00.

Defendant contends on this appeal that the court erred in refusing to permit him to file counter-affidavits. We believe that error was committed. It cannot be disputed that plaintiff is entitled to question jurors on their voir dire as to their interest in a defending insurance company, if the purpose of the questioning is shown to be an attempt in good faith to ascertain such interest and not a mere attempt to inject the issue of insurance into the case. *Smithers v. Henriquez*, 368 Ill. 588; 15 N.E. (2d) 499. If plaintiff wished to determine this issue in good faith however, we do not see why he should object to counter-affidavits especially since this practice has been approved by the Supreme Court. *Kavanaugh v. Parret* 379 Ill. 273; 40 N.E. (2d) 500. Plaintiff relies on *Moore v. Edmonds* 384 Ill. 535; 52 N.E. (2d) 216, but that case merely held

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that the counter-affidavits filed therein were insufficient and that therefore the plaintiff was entitled to proceed to question prospective members of the jury concerning their interest in the defending insurance company. Cross error denied.

The judgment of the Circuit Court of Menard County is reversed and the cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

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Extract

332 I.A. 439²

General Number 9547.

Agenda Number 9.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

OCTOBER TERM, A.D. 1947.

213 A

WILLIAM McNABB, a Sole Trader
Doing Business under the
Trade Name of the HARDIN
DRUG COMPANY,

Plaintiff-Appellant,

-VS-

JOSEPH C. SCHENKER, et al.,

Defendants-Appellees.

APPEAL FROM CIRCUIT COURT
OF CALHOUN COUNTY.

~~BERNARD A. CLAY, JUDGE,~~

~~Judge Presiding.~~

HAYES, J.:

On January 14, 1929 William McNabb doing business as the Hardin Drug Company obtained a judgment in the County Court of Calhoun County against W. G. Squier, in the sum of \$702.74. No execution was ever issued on this judgment. On September 13, 1929 Squier acquired by devise, a life estate in certain real estate and title in fee simple to another tract. On December 23, 1936 one W. A. Richardson obtained a judgment in the Circuit Court of Calhoun County against Squier for \$1,573.05. Execution was issued, a levy made and the Squier real estate was sold at a Sheriff's sale on June 25, 1938. A certificate of purchase was issued to

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Richardson. Squier did not redeem from the sale. On September 20, 1939, just prior to the expiration of the fifteen month period of redemption Squier, together with one Hattie Fluent, executed a quit claim deed of the real estate to W. G. Springman. Hattie Fluent was Squier's housekeeper, managed his farm and had an interest in the crops which were conveyed to Springman in the deed. Hattie Fluent was also the owner of a judgment against Squier for \$1,342.89, which on September 20 was also assigned to Springman. Springman, as a part of the same transaction, agreed to convey the Squier lands to Hattie Fluent. He redeemed the real estate and on July 22, 1942 conveyed the property to Grace Miller, another of Squier's judgment creditors who contracted to convey the property to Hattie Fluent.

On March 10, 1941 McNabb revived his judgment against Squier in the County Court of Calhoun County. On April 16, 1941 he wrote the Sheriff of Calhoun County asking him to comply with an earlier oral request that he advertise and offer for sale the Squier land, calling attention to certain sections of the Illinois Statutes. This the Sheriff refused to do.

On August 13, 1943 McNabb filed a complaint in chancery in the Circuit Court of Calhoun County which alleged that the judgment of Hattie Fluent was based on a note that was fraudulent and void; that the execution thereon, the certificate of redemption to Springman and the deeds to Springman and Grace Miller were false, fraudulent and not bona fide, and

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part of a conspiracy to conceal the actual ownership of the Squier land in order to hinder and delay McNabb and other creditors in the collection of their claims. McNabb offered to pay any sums found due the various parties and prayed that all the enumerated transactions be declared fraudulent and void and that he be authorized to redeem the premises by paying into court such sums as the court might determine.

A hearing was had on September 20, 1945 and a decree was entered dismissing the complaint for want of equity. McNabb appealed to the Supreme Court which transferred the cause to this court.

Appellant complains of the judgment of the Circuit Court for several reasons. It would serve no useful purpose to examine each of these points at length in this opinion since in any event the judgment must be affirmed. McNabb has been guilty of laches. He obtained his judgment in January, 1929; the property he now asks to redeem was sold by the Sheriff pursuant to the Richardson judgment on June 25, 1938; Springman redeemed on September 20, 1939; McNabb did not revive his judgment until March, 1941, and did not file this suit until August, 1943. We do not believe he has exercised that vigilance which equity requires as a condition precedent to exercise its broad powers. On the date of the sale in 1938, the McNabb judgment was not a lien on the premises and it was not revived until almost three years later. This suit was not filed until five years after the sale. It is true that McNabb unsuccessfully requested the Sheriff to resell the property in April, 1941 but he waited over two years after that incident before

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filing this suit. We believe he has been dilatory and the Circuit Court of Calhoun County properly dismissed his complaint. *Fitch v. Miller*, 200 Ill. 170; *Kerfoot v. Billings*, 160 Ill. 563.

The judgment of the Circuit Court of Calhoun County is affirmed.

JUDGMENT AFFIRMED.



Abstract

General Number 9555.

Agenda Number 15.

333 I.A. 440

IN THE APPELLATE COURT
OF ILLINOIS
THIRD DISTRICT
OCTOBER TERM, A.D. 1947.

DAVID W. RYAN and J. L.
WALKER, Co-Partners
Doing Business Under
The Name and Style of
R. & W. Transports,

Plaintiffs-Appellees,

-vs-

ILLINOIS CENTRAL RAILROAD
COMPANY, a Corporation,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT
of SANGAMON COUNTY.

~~HONORABLE CLYDE L. SMITH,~~
~~Judge Presiding.~~

HAYES, J.:

David William Ryan and J. R. Walker, doing business as the R. & W. Transports filed suit against the Illinois Central Railroad Company in the Circuit Court of Sangamon County for damages to the plaintiff's truck received when it struck defendant's train. Ryan, the driver of the truck, testified he was approaching the City of Lincoln on State Route 10 at about two o'clock in the morning; that it was dark and rainy; that his windshield wipers were working and his lights were on. He noticed a monument erected at the side of the road and the lights of the City of Lincoln in the distance, but did not observe the railroad warning sign erected three

Appendix

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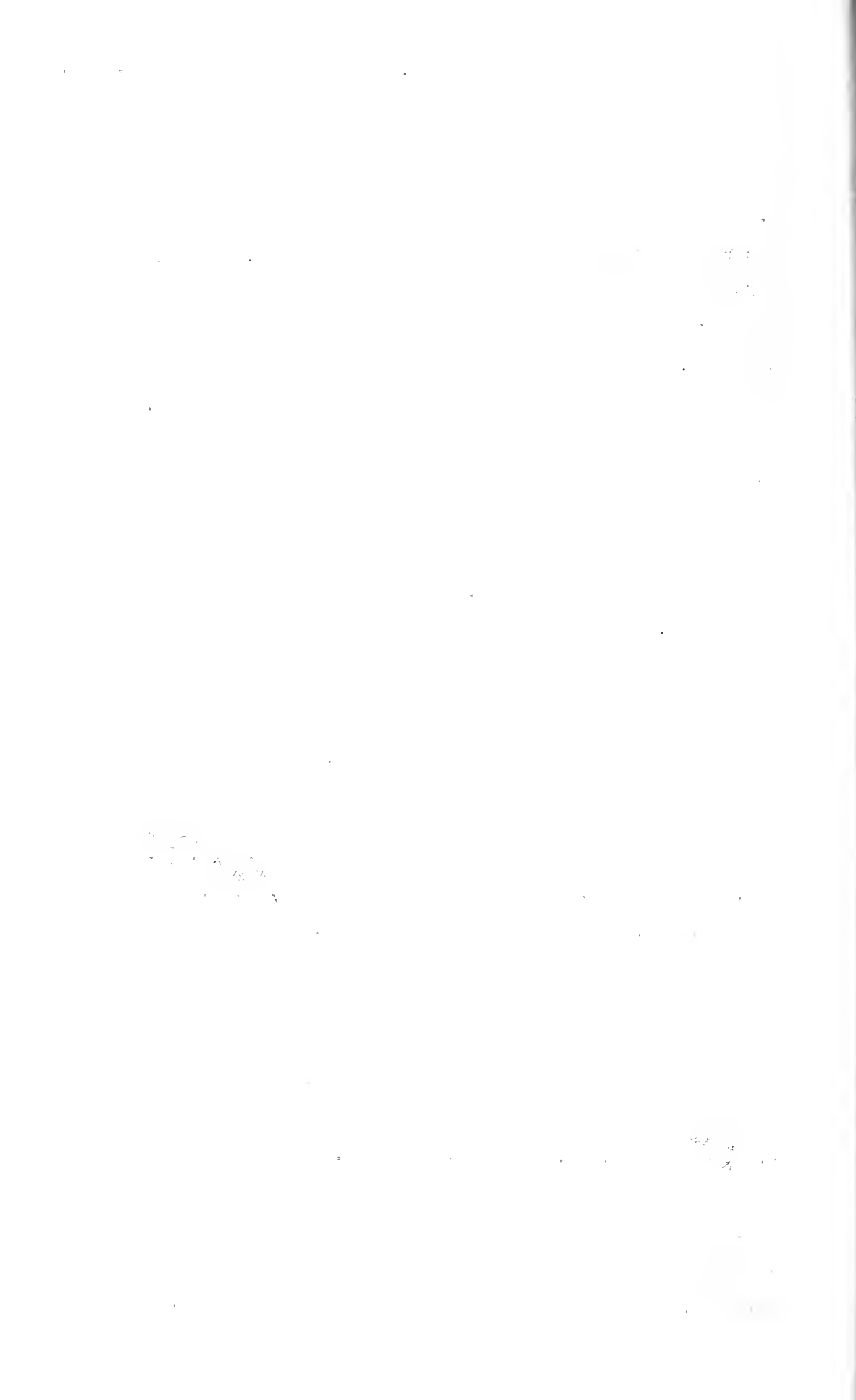
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hundred and seventy nine feet from the crossing. Shortly before he reached the crossing he discovered defendant's train which was standing still, a flat car blocking the crossing. He attempted to stop but failed, and the truck he was driving was demolished in the resulting collision. The Circuit Court of Sangamon County denied defendant's motion for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence, and submitted the case to the jury who returned a verdict for plaintiff for fifteen hundred dollars. Defendant has appealed to this Court.

The defendant relies on numerous cases in this state and elsewhere, holding that the presence of a train blocking an intersection is adequate notice to approaching drivers that the crossing is occupied and the failure to provide warning signals is not negligence on the part of the railroad under these circumstances. *Cash v. N.Y.C. & H.R. Co.*, 294 Ill. App. 389; *Coleman v. Burlington Chicago B. & Q. R. Co.*, 287 Ill. App. 483 and cases cited therein. Plaintiffs' claim however that the defendant had provided flashing signals which were not in operation at the time of the accident, that having done so, this amounted to an invitation to proceed across the intersection which plaintiffs' driver relied upon. In this connection they cited *Langston v. Chicago & N.W. Ry. Co.*, 330 Ill. App. 260.

An examination of the record discloses evidence that there were flasher signals at the intersection; there is also evidence that plaintiffs' driver saw them and that they were not in operation at the time of the accident.



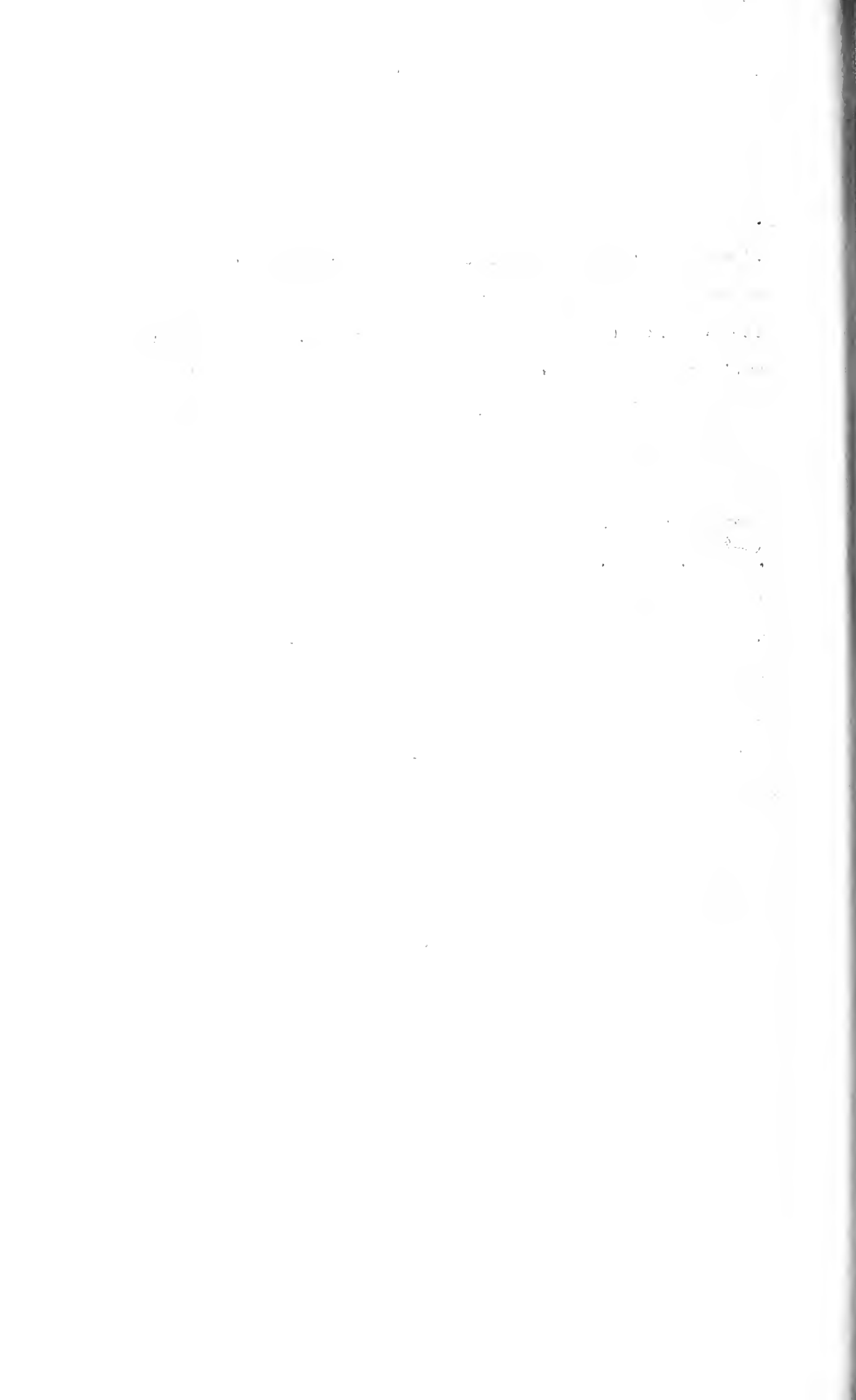
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Evidence of these latter facts was objected to by defendant at one point in the trial and withdrawn by plaintiffs' attorney and the jury told to disregard it. Later defendant's objection to additional evidence of these facts was sustained by the Court. Thus there was no competent evidence before the jury that the flash signals were not working or that plaintiffs' driver relied upon them.

Under these circumstances the decision in Langston v. C^{nic260} & N.W. Ry Co., supra, cannot apply. The evidence properly before the Court and Jury, did not justify the Court's submission of this case to the jury. On the other hand we believe that the Circuit Court erred in sustaining defendant's objection to evidence that the flasher signals were not working. For this reason the case should be tried anew.

The judgment of the Circuit Court of Sangamon County is therefor reversed and the cause remanded to that Court for a new trial.

REVERSED AND REMANDED.



In the Matter of the Estate of
 PETER TH. SMIRNIOTIS,
 Deceased.

Appeal of GIANNOULA E. GOUNDANIS,
 DEMETRA A. PAPADOPOULOS, FOTINI
 A. ROMIOS,

Appellants,

v.

WILLIAM TH. SMITH, individually
 and as administrator of the
 Estate of Peter Th. Smirniotis,
 Deceased; GERALD A. O'BRIEN,
 individually and as attorney;
 A. POUIMPOURAS, individually and
 as Consul General of Greece;
 JOHN D. VOSNOS and JOHN D.
 DRITSAS,

Appellees.

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APPEAL FROM
 CIRCUIT COURT
 COOK COUNTY.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

This is an appeal by three heirs, sisters of decedent and residents of Greece, from an order of the Circuit court on appeal from the Probate court striking the supplemental petition of Parry, appellants' attorney in fact, as to Smith, administrator of the estate, and O'Brien his attorney, dismissing it as to Dritsas, Vice Consul of Greece, and Vosnos, attorney for the Vice Consul, and Poumpouras, acting Consul General of Greece, and directing that the Consul General "shall retain and hold the sum of \$15,662.01, subject to final disposition by the Probate court of Cook county" etc. Motions to dismiss the appeal were reserved to the final hearing.

Decedent died intestate leaving five heirs - a brother residing in Cook county who was appointed administrator, and four sisters, residents of Greece. His estate consisted of real and personal property valued at approximately \$125,000. April 23, 1945 an order was entered permitting the Consul General to enter his appearance and the appearance of the

In the Matter of the Estate of
 PETE J. SMITH
 Decedent

Appeal from the
 Superior Court of the State of
 A. D. 1945

WILLIAM T. SMITH, Plaintiff,
 and as Administrator of the
 Estate of PETE J. SMITH,
 Defendant,
 vs.
 JOHN A. SMITH, Defendant.
 (Williams, Plaintiff,
 and as Administrator of the
 Estate of PETE J. SMITH,
 Defendant, vs. JOHN A. SMITH,
 Defendant.)

This is an appeal from a judgment of the Superior Court of the State of New Jersey, in and to the effect that the plaintiff, William T. Smith, and as Administrator of the Estate of Pete J. Smith, is entitled to the sum of \$15,000.00, plus interest thereon, from the defendant, John A. Smith, and that the costs of the proceedings herein be paid by the defendant. The plaintiff, William T. Smith, and as Administrator of the Estate of Pete J. Smith, moved for summary judgment, and the defendant, John A. Smith, opposed the same. The court, after hearing the parties and the evidence, rendered the judgment herein appealed from. The plaintiff, William T. Smith, and as Administrator of the Estate of Pete J. Smith, moved for summary judgment, and the defendant, John A. Smith, opposed the same. The court, after hearing the parties and the evidence, rendered the judgment herein appealed from.

Decedent died intestate leaving three children - a brother residing in Cook County, who is married and has a family, and four sisters, residing in various parts of the State. The estate of decedent consisted of real and personal property valued at approximately \$155,000.00. April 22, 1945 an order was entered appointing the General to enter his appearance and the execution of the

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four heirs in Greece, and for respondent Vosnos to enter his appearance as their attorney. July 26, 1945 the four heirs in Greece appeared before Notary Public Tsarouhis in Tripolis and executed a power of attorney to the Consul General in Chicago to represent them in the estate. August 6, 1945 the three heirs now appealing appeared before Notary Public Tsarouhis and executed a revocation of the power of attorney to the Consul General and on the same day, before the same notary, executed a power of attorney to Sotirios Petros Stathopoulos, a solicitor and resident in Athens to represent them in the matter of their inheritance from their deceased brother, with full power and authority, including the power "to appoint other attorneys, counselors or not, with any power he might approve of." August 16, 1945, Stathopoulos executed before the same Notary Public Tsarouhis a power of attorney to Demetri Parry of Chicago, Illinois, giving him power "to appear and represent his assignors (principals) before any competent authority and before any court of whatever degree and competence" in respect to the legitimate rights of the principals in the estate of decedent. The signatures to these powers of attorney and the revocation of the power of attorney to the Consul General, filed in the Probate court, were certified by the same Greek officials and the instruments authenticated in the same manner, except that the powers of attorney to Stathopoulos and Parry were also certified to by the Deputy Vice Consul of the United States in Athens.

October 29, 1945 Parry served notice on O'Brien and Vosnos, attorneys respectively for the administrator and the acting Consul General, that on Tuesday, October 30, 1945 he would appear in the Probate court and ask leave to enter his appearance for the three heirs for whom he was acting. He claims to have previously advised these attorneys of his

four years in age, and for four years before he entered his
appearance at the trial. (Exhibit 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

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appointment and of the revocation of the power of attorney to the acting Consul General. This motion was continued to November 2, 1945. In the meantime, without notice to Parry, the petition of the acting Consul General, with certified copy and translation of the power of attorney of the four heirs resident in Greece, asking for a partial distribution of \$1,000 to each of the heirs, was presented to the Probate court on October 31 and an order entered for such partial distribution payable to the acting Consul General. November 2, 1945 an order was entered in the Probate court giving leave to Parry to file his verified petition, ordering the Consul General to answer same within ten days and setting the matter for hearing on November 19. It was further ordered that Parry be given notice of all proceedings to be had in the cause. On November 19 the hearing upon the petition was continued generally. The Consul General objected that Parry had failed to file a copy of the power of attorney to Stathopoulos with his petition and to show that the power of attorney to Parry was properly acknowledged. Parry then advised Vosnos and O'Brien that he was going to return the powers of attorney to Greece by air mail and get them back as soon as possible. Vosnos and O'Brien replied, "By the time you get these powers of attorney back we will close the estate." Dritsas, the Deputy Consul General and counsellor of the Consul, admits seeing a copy of the revocation of the power of attorney to the Consul General on November 15 or 16, and testifies that on November 23, 1945 the Department of Foreign Affairs in Greece notified the Consul General in Chicago of the revocation of his power of attorney. Vosnos also admits seeing the revocation or a copy of it November 15 or 16, 1945. Neither he nor O'Brien contradict Parry's

appointment and of the revocation of the power of attorney to the acting Consul General. This motion was continued to November 2, 1945. In the meantime, without notice to Parry, the petition of the acting Consul General, with certified copy and translation of the power of attorney of the four heirs resident in Greece, asking for a partial distribution of \$1,000 to each of the heirs, was presented to the Probate Court on October 31 and an order entered for such partial distribution given to the acting Consul General. November 2, 1945 an order was entered in the Probate Court giving leave to Parry to file his verified bill of particulars. Consul General did so on November 14. It was further ordered matter for hearing on November 14. It was further ordered that Parry be given notice of the hearing and be heard in the matter. On November 19 the hearing upon the petition was continued indefinitely. The Consul General objected that Parry had failed to file a copy of the power of attorney to Statopoulos with the petition and to show that he had power of attorney to Parry was properly considered. Parry then advised Statopoulos and the latter did not return to return to Parry powers of attorney to Parry by his bill and then then back as soon as possible. Statopoulos and the latter did not return to return to Parry time you not have power of attorney back to his office the estate." Statopoulos, the Consul General and counsel for of the Consul, Statopoulos and the latter did not return to return to Parry power of attorney to the Consul General on November 15 or 16, and testified that on November 2, 1945 the appointment of Foreign Affairs in Greece notified the Consul General in Chicago of the revocation of his power of attorney. Statopoulos also admits seeing the revocation or a copy of it November 15 or 16, 1945. Neither he nor Statopoulos contradicted Parry's

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statement quoted above in respect to closing the estate.

December 14, 1945, O'Brien served notice on Vosnos as attorney for the acting Consul General, that the final report and account of the administrator would be presented to the Probate court December 27, 1945. It is conceded that no notice in respect to this report and account was given to Parry. On December 27 the acting Consul General, by Vosnos his attorney, filed in the Probate court an appearance, waiver of notice and consent to approval of the final account on behalf of the three heirs whose power of attorney to the Consul General had been revoked and who were then represented by Parry. The final report and account was approved. By this order the administrator received a fee of \$2,500 and O'Brien and his associate \$9,000 as attorneys for the administrator. On the following day, December 28, 1945, on the petition of the acting Consul General, an order was entered directing the administrator to pay to him in his official capacity the distributive shares - \$4,720.67 each - of the three heirs represented by Parry.

On January 14, 1946, Parry filed his supplemental petition setting up substantially all the facts herein stated and attaching thereto certified copies of the powers of attorney to Stathopoulos and Parry certified by the Vice Consul of the United States at Athens and asking that the order of partial distribution of October 31, 1945 and all orders and proceedings approving the final account and distribution and the payment of money to distributees be vacated and set aside, and that the acting Consul General, Vice Consul and their attorney, Vosnos, be required and ordered to return all moneys received from the administrator; that leave be given to petitioner to file objections to the final account of the administrator, etc. The acting Consul

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General and his attorney moved to strike this supplemental petition, as did the administrator and his attorney. February 1, 1946 an order was entered denying the motion of the respondents to strike the supplemental petition and ordering them and Dritsas, the Vice Consul, to answer the petition within 20 days, and further ordering the acting Consul General to pay to Parry as administrator de bonis non of the estate the sum of \$15,660.01 within five days, and that he on March 1, 1946 produce the personal receipt of the three heirs for the sum of \$500 each, purported to have been paid to them, or pay said sum to Parry. February 8, on the petition of the acting Consul General and his attorney, this order was vacated and set aside and in lieu thereof there was entered, nunc pro tunc as of February 2, 1946, an order striking the supplemental petition as to the administrator and his attorney, denying the motion of the acting Consul General and his attorney to strike the supplemental petition and ordering that the acting Consul General, his attorney and Dritsas, the Vice Consul, file their respective answers to the supplemental petition within 20 days; that Poupouras, individually and as acting Consul General, pay Parry, administrator de bonis non, the sum of \$15,662.01 within five days, and on March 13, 1946 produce the personal receipts of the three heirs as theretofore directed. From the portion of the order sustaining the motions of the administrator and his attorney and striking the supplemental petition as to them, the three heirs appealed to the Circuit court.

On appeal to the Circuit court the charges of fraud against the administrator and his attorney were eliminated from the supplemental petition, and certain minor amendments were also made. Each respondent answered the petition as amended. When the case came on for final hearing appellants

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were denied the right of going into the propriety of the allowances to the administrator and his attorneys, the court stating that the hearing would be limited to the matter of the appeal. Parry, O'Brien, Dritsas and Vosnos testified. There is no substantial conflict in the testimony. The Circuit court, insisting that petitioners would have a hearing upon the supplemental petition in the Probate court, entered an order sustaining the motion of Smith and O'Brien to strike the supplemental petition as amended and ordering that they go hence without day and recover their costs of and from Parry; finding that Poumpouras, the acting Vice Consul, individually and as attorney in fact for certain heirs has submitted to the jurisdiction of the court, and denying and overruling his motion, individually and as an attorney in fact to strike the supplemental petition; ordering that said Poumpouras retain and hold the sum of \$15,662.01, subject to final disposition by the Probate court of Cook county, and that he produce within 30 days the personal receipts of the three heirs for the sum of \$1,500 purported to have been sent to them; that a copy of the order be served upon the La Salle National Bank of Chicago in which Poumpouras has deposited the \$15,662.01 mentioned above; that Dritsas and Vosnos be dismissed as parties to the appeal. Within apt time the three heirs, by Parry their attorney, appealed.

Poumpouras, Dritsas and Vosnos filed a motion to dismiss the appeal on the ground that the order appealed from was not a final order and that subsequent to the entry of the order Parry accepted from Poumpouras the \$15,662.01 directed to be paid to him by the order appealed from and thereby released all errors complained of. Smith and O'Brien filed a similar motion to dismiss the appeal and in their brief urged as a further ground for dismissal that the appeal

7.

is taken by the three heirs and not by Parry, who presented the supplemental petition, and that the heirs are not parties to the record.

The order appealed from is properly divided into three parts: one striking the supplemental petition as to Smith and O'Brien, a second dismissing Dritsas and Vosnos out of the proceeding, and a third directing Poumpouras to hold the distributive shares of the heirs appealing until the further order of the Probate court. Each portion of the order deals with separate and distinct matters. That part of the order striking the supplemental petition as to Smith and O'Brien disposes of all matters in controversy between Parry and his principals on one side and respondents Smith and O'Brien on the other. It is a final order as to Smith and O'Brien and from it a separate appeal may be taken. Sec. 50, sub-par. 2, Civil Practice Act. Ill. Rev. Stat. 1945, chap. 110, par. 174. The same ruling must be made in respect to the part of the order dismissing Dritsas and Vosnos from the proceeding. The part directing Poumpouras to hold the distributive shares of the three heirs is not a final order and therefore not appealable. Respondents show by affidavit that subsequent to the order appealed from the money held by Poumpouras was paid over to Parry as administrator de bonis non of the estate of decedent. There is nothing in the record to show when and for what reasons Parry was made administrator. In any event, so far as the record now shows, he holds the money subject to the orders of the Probate court, and it was not paid to him as attorney in fact for the heirs on whose behalf he filed the supplemental petition upon which this appeal is based. The money was not paid to the three heirs or to Parry for them. It does appear from an affidavit in the record that this payment was made by the Consul General upon direction of the Department of Foreign Affairs of Greece.

It also appears by affidavits filed that Parry subsequently paid to Dritsas and Vosnos \$1,500 for alleged services rendered in the cause. Authority for this payment or the right of Dritsas and Vosnos to receive it is not shown. During the proceedings in the Probate court Parry denied any authority as attorney in fact to pay Dritsas and Vosnos for attorneys' fees. As administrator de bonis non, payment could only be made by the order of the Probate court. The position of Smith and O'Brien that the three heirs, not being parties to the record, could not appeal, is untenable. It is true that prior to the Civil Practice Act only parties to the record could appeal. However, parties in interest or those directly affected by the judgment or decree appealed from could have had a judgment or decree reviewed by writ of error. Under the Civil Practice Act (sec. 81) such persons are permitted to appeal. Almon v. American Carloading Corp., 380 Ill. 524, 529-30; People ex rel. Yohnka v. Kennedy, 367 Ill. 236. The three heirs here appealing are certainly parties in interest. The money in controversy held by Poumpouras belonged to them, and the fees allowed the administrator and O'Brien on the approval of the final report and accounts were taken, in part, from their distributive shares in the estate.

The motions to dismiss the appeal are denied except as to that portion of the order directed against Poumpouras, which is allowed. The motion of Poumpouras, Dritsas and Vosnos to strike the brief of Parry because couched in "disrespectful, scurrilous, vituperative, scandalous, acrimonious, unwarranted and flippant language," is denied. The record plainly shows that after actual notice of the revocation of the power of attorney of Poumpouras to act as an attorney in fact for the three heirs, and after the entry of an order directing that notice of all proceedings in the Probate court be given Parry, O'Brien

It also appears by all advice filed that party subsequently
paid to Driscoll and Vonnos \$1,500 for alleged services
rendered in the estate. Authority for this payment or the
right of Driscoll and Vonnos to receive it is not shown. During
the proceedings in the Probate Court party denied any authority
as attorney in fact to pay Driscoll and Vonnos for attorneys'
fees. As admitted with the estate now, payment could only be
made by the order of the court. The position of Smith
and O'Brien that the money was not being received by the
estate, could not be, is undeniable. It is true that
prior to the civil proceedings only parties to the record
could request a review, but in interest of those directly
affected by the same and in order to prevent from conflict have
had a further review of the record by the court. Under
the Civil Procedure Act, 1907, all such review and appeal
to appeal. Section 10, Act No. 100, 1907.
524, 525-50; Section 10, Act No. 100, 1907.
The above have been filed and certified parties in
interest. The money in controversy held by respondent
belonged to them, and the fees allowed the administrator and
O'Brien on the removal of the first report and account were
taken, in part, from their distributive shares in the estate.
The notice to them was not served as stated except
as to that portion of the estate which was subject to their
which is allowed. The notice is not correct, O'Brien and
Vonnos to state the bill of party because contained in
"disproportionate, excessive, unproductive, scandalous,
extraneous, unnecessary and flippant language," is denied.
The record clearly shows that after actual notice of the
revocation of the power of attorney of respondent to act
as an attorney in fact for the three heirs, and after
the entry of an order dissolving that notice of all
proceedings in the Probate Court be given Larry, O'Brien

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and Vosnos, as attorneys, presented and procured the approval of the final report and account of the administrator upon an appearance, waiver and notice signed by Vosnos on behalf of Poumpouras as attorney in fact and in law of the three heirs and without notice to Parry. By approval of the report Smith and O'Brien obtained very substantial fees. Immediately thereafter the distributive shares of the three heirs now appealing were paid over to Poumpouras, from whom Dritsas and Vosnos expected to receive fees for services in the estate. This action, at least on the part of O'Brien and Vosnos, was premeditated - the carrying out of their intention, announced to Parry, to close the estate before Parry could obtain the return of properly authenticated powers of attorney authorizing him to act on behalf of his principals. The Probate court was undoubtedly imposed upon, and suspicion is aroused as to the legitimacy of the fees allowed Smith and O'Brien without contest and of the fees subsequently claimed and exacted by Dritsas and Vosnos from Parry. The whole situation demands a thorough and searching investigation. For their participation in it the attorneys may be subject to disciplinary action. Peo. ex rel. Chicago Bar Ass'n. v. Brillow, 309 Ill. 173. It may be that the fees procured by the parties should be disallowed, at least in part.

There should be a full and complete hearing on the final report and account in the Probate court as to all the parties to the supplemental petition, and to that end the orders of the Circuit court as to Smith, O'Brien Dritsas and Vosnos are reversed and the cause remanded to the Circuit court with directions to vacate the order of

and Vonnos, as attorneys, presented and produced the approval of the final report and account of the administrator upon an appearance, waiver and notice signed by Vonnos on behalf of Thompson as attorney in fact and in law of the three heirs and without notice to Perry. By approval of the report Smith and O'Brien obtained very substantial fees. Immediately thereafter the distributive shares of the three heirs now appealing were paid over to Thompson, from whom Smith and Vonnos expected to receive fees for services in the estate. This action, at least on the part of O'Brien and Vonnos, was premeditated - the carrying out of their intention, announced to Perry, to close the estate before Perry could obtain the return of properly authenticated copies of attorney authorizing him to act on behalf of his principals. The Probate Court was undoubtedly imposed upon, and suggestion is made as to the legitimacy of the fees allowed Smith and O'Brien without contest and of the fees subsequently claimed and exacted by O'Brien and Vonnos from Perry. The whole situation demands a thorough and searching investigation. For their participation in it the attorneys may be subject to disciplinary action. See, e.g., Chicago Bar Ass'n v. Brillow, 309 Ill. 173. It may be that the fees procured by the parties should be disallowed, at least in part. There should be a full and complete hearing on the final report and account in the Probate Court as to all the parties to the administrative petition, and to that end the orders of the Circuit Court as to Smith, O'Brien, O'Brien and Vonnos are reversed and the cause remanded to the Circuit Court with directions to vacate the order of

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the Probate court approving the final report and account.

ORDERS OF CIRCUIT COURT AS TO
SMITH, O'BRIEN, DRITSAS AND
VOSNOS REVERSED AND CAUSE
REMANDED TO THAT COURT WITH
DIRECTIONS.

Feinberg and O'Connor, JJ., concur.

the Probate Court of the County of Cook, Illinois, do hereby certify that the above is a true and correct copy of the original as the same appears in the records of said Court.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Court at Chicago, Illinois, this 10th day of June, 1908.

John J. McLaughlin, Clerk of the Probate Court of Cook County, Illinois.

44136

FLORENCE WAGNER,
Appellee,
v.
FRANK WAGNER,
Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

332 I.A. 441

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment in a replevin action involving a passenger automobile and an automobile truck.

October 3, 1946, plaintiff filed her affidavit for replevin. On October 29, 1946, defendant, apparently treating the affidavit for replevin as a complaint, filed what is designated as an answer and a counterclaim. By the answer defendant contested plaintiff's ownership of the automobile and truck and asserted his ownership therein, subject to certain chattel mortgage liens. By his counterclaim defendant sought to recover certain damages as a result of the alleged wrongful detention of the automobile and truck. On February 7, 1947 the case was tried and plaintiff at that time filed a complaint alleging her right to the possession of the property involved and defendant's wrongful detention of same. Judgment for plaintiff was entered.

Defendant erroneously takes the position that the complaint should have been filed before the replevin writ was issued and that at the time judgment was entered the court was without jurisdiction to enter any judgment except a nonsuit against the plaintiff. Section 1 of the Civil Practice Act excludes replevin, and other actions in which the procedure is regulated by special statutes, from the Civil Practice Act. The Replevin Act (Ill. Rev. Stat. 1945,

FLORENCE, WYOMING

FRAZER, ARTHUR

WYOMING
COUNTY
CLERK

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COUNTY
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chap. 119, sec. 4) provides that an affidavit for replevin must be filed before the issuance of the writ. Section 17a, an amendment added in 1935, provides for the filing of a complaint ten days before the return day of the writ of replevin and that, if the complaint is not filed ten days before the next succeeding return day "the defendant may, in the discretion of the court, be awarded judgment." It is apparent from the language of the statute that the filing of the complaint is not jurisdictional. The record before us shows no objection to the filing of the complaint on the day of the trial, no action taken by defendant based on the failure to file the complaint or any objection to proceeding to trial when the case was reached. The cases cited by defendant based on the former replevin and practice acts have no application to the situation before us.

Defendant also complains that the judgment is contrary to the law and evidence, and in his reply brief says "It is the contention of counsel for the defendant that there is no evidence contained in the record to warrant the verdict of the jury." Defendant testified that the automobile and truck were placed in plaintiff's name - the parties having been husband and wife until divorced in the latter part of 1945 - in order to avoid a levy upon them under a judgment against defendant, and that they were subsequently conveyed back to him. He introduced in evidence certificates of title from the Secretary of State covering both vehicles. The license for each vehicle was taken in the name of plaintiff. She denied that the vehicles were conveyed to her to avoid the claim of defendant's creditor and says that during their married life she worked in the business of her husband, keeping books and records; that a truck traded in for the truck involved herein was at least partly paid for by money obtained from her mother. It

On 11/2/50, the following information was received from the Bureau of the Census:

Must be filed with the local health officer.

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NO FIRM AND NO INDUSTRY IN ECONOMIC ANALYSIS

1954 and 1955 for 1956 and 1957, and for 1958 and 1959.

before the fact of the

The "Whispering" is a very old, well-known, and reliable source of information.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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no other person in the world

8. Amplification of DNA and PCR - Journal of Forensic Science - September

Revised: 10/27/01

Approved: _____

is now listed below. I have not yet had the chance to check it against

41. Transition to a new state of affairs is not a simple matter.

3.

is admitted that the passenger automobile was originally purchased in the name of defendant's father and thereafter conveyed by him to plaintiff. He was not called as a witness. There is evidence in the record supporting plaintiff's claim. The jury and the trial court, which heard and saw plaintiff and defendant testify, accepted plaintiff's theory of the case. As they are not against the manifest weight of the evidence we cannot disturb the verdict and the judgment entered thereon.

The judgment is affirmed.

AFFIRMED.

Feinberg and O'Connor, JJ., concur.

is admitted that the person who was originally
purchased in the name of John's father and mother
after conveyed by him to his son. It was not called as
a witness. There is evidence in the record suggesting
plaintiff's claim. The law and the fact, which
heard and saw plaintiff and defendant testify, as stated
plaintiff's theory of the case. The law was not admitted
the witness: that the law and the fact of the case
verdict and a judgment entered thereon.
The judgment is affirmed.

1911

Rehearing denied.

44178

THERESA SHAW,
Appellee,
v.
ROBERT C. SHAW,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

332 I.A. 442

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

This appeal by the plaintiff in a separate maintenance action, originally taken to the Supreme court, involves the single question of when a valid Arkansas decree of divorce supersedes and nullifies a prior Illinois decree for separate maintenance. 397 Ill. 118.

On June 5, 1945, plaintiff procured a decree for separate maintenance directing the defendant to pay to her for support and maintenance \$22.50 on or before June 11, 1945, and a like sum on or before Monday of each week thereafter until the further order of the court. Subsequent to the entry of the decree defendant moved to the State of Arkansas and there instituted a suit for divorce from plaintiff, who entered her appearance in said cause, testified by deposition and otherwise participated in the proceeding which resulted in a decree of divorce in favor of defendant on January 7, 1946, and providing: "All property rights and alimony rights of the defendant, Theresa Shaw, are hereby reserved and shall be reopened at any time upon motion of the defendant, over which the court retains jurisdiction." On June 13, 1946, plaintiff filed her petition in the Superior court of Cook county, which had granted the decree for separate maintenance, reciting the order of June 5, 1945 directing the payment of alimony,

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

THESSA SHAW,
Appellee,
v.
ROBERT O. SHAW,
Appellant.

MR. PRESIDING JUSTICE ALBERT J. KANE, JR. OF THE COURT.

This appeal by the plaintiff in a separate maintenance action, originally brought in the domestic court, involves the single question of when a wife who has been divorced and remarried is entitled to a further Illinois decree for separate maintenance. On June 5, 1945, plaintiff secured a decree for separate maintenance directing the defendant to pay to her for support and maintenance \$10.00 on or before June 11, 1945, and the sum of one dollar weekly of each week thereafter until the further order of the court. Subsequent to the entry of the decree defendant moved to the State of Arkansas and there instituted a suit for divorce from plaintiff, who entered her appearance in said cause, testified by deposition and otherwise participated in the proceedings which resulted in a decree of divorce in favor of defendant on January 8, 1946, and provided: "All property rights and alimony rights of the defendant, Thessa Shaw, are hereby reserved and shall be resumed at any time upon motion of the defendant, over which the court retains jurisdiction." On June 12, 1946, plaintiff filed her petition in the Superior Court of Cook County, which had granted the decree for separate maintenance, reciting the order of June 5, 1945 directing the payment of alimony,

2.

the entry of a judgment in favor of plaintiff and against defendant on July 3, 1945 for all sums due under the decree up to June 29, 1945, and that since June 29, 1945 to and including June 17, 1946, fifty-one weekly payments totaling \$1,147.50 have accrued. June 20, 1946 defendant filed his answer admitting the entry of the decree for separate maintenance on June 5, 1945 awarding to plaintiff \$22.50 per week^{for} and as support and maintenance commencing June 11, 1945, and setting up the divorce proceedings instituted by him in Arkansas, the submission of plaintiff to the jurisdiction of the courts of that state, and alleging that by the entry of the decree in Arkansas on January 7, 1946 all subsequent payments of alimony have abated. On June 24, 1946, on a hearing before the court at which no evidence was heard and the court stated that he was not going to pay any attention to the Arkansas decree, judgment was entered against the defendant and in favor of the plaintiff for \$1,147.50 and execution ordered. From this judgment defendant appealed.

Plaintiff admits the validity of the Arkansas decree for divorce but "contends that the payments continued to accrue under the separate maintenance decree, at least until appellant filed a motion or petition therein asking the court to terminate the payments, or the court was otherwise apprised of the entry of the Arkansas decree. In no event could they terminate prior to January 7, 1946, at which time there was \$652.50 due." The decree for separate maintenance was based upon the existence of the marital relation. The duty of defendant to support and maintain the plaintiff ceased upon the termination of the marital relation. The validity of the Arkansas divorce decree being admitted, all liability of the defendant to support the plaintiff ceased and determined. Plaintiff had

3.

full knowledge of the entry of the divorce decree and its legal consequences. Defendant was under no duty to apprise the court of the entry of the decree for divorce or to take any steps until an attempt was made to compel payment of support and maintenance money for a period after the entry of the decree. Plaintiff cites no authorities in support of her position that she is entitled to alimony until the court entering the decree for support and maintenance is advised of the entry of the decree for divorce, and we believe none can be found.

In his answer to the petition defendant makes no claim of having made any payments on account of support and maintenance money since June 29, 1945, except to claim credits for certain sums alleged to have been paid plaintiff by the Veterans Administration. However, on the hearing no attempt was made to establish this claim. It therefore appears from the record that plaintiff is entitled to the support and maintenance money specified in the decree until January 7, 1946.

The judgment appealed from is reversed and the cause remanded to the trial court with directions to enter judgment in favor of plaintiff for the sum of \$652.50.

REVERSED AND REMANDED WITH DIRECTIONS.

Feinberg and O'Connor, JJ., concur.

44087

ELLA R. HOPKINS and MARY IRENE STENSON,
Executrix of the Estate of Joseph
Clement Stenson, Deceased,
Appellees,

v.

PAUL C. LOEBER, et al.,
Defendants,

GRACE C. GILLELAND, J. EDWARD JONES, et al.,
Intervenors, and PAUL C. LOEBER, Defendant,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

332 I.A. 442²

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

The appeal is by the defendants from that portion of the decree of February 26, 1947, which allowed to plaintiffs \$5,000 attorneys' fees, for services rendered by the attorneys prior to and including the decree entered in said cause on July 2, 1943, and \$993.27 for necessary outlay in prosecuting the cause.

The petition for fees filed by the plaintiffs on July 23, 1943, and upon which the allowance was made in the decree now appealed from, set forth in detail the services rendered by plaintiffs' counsel and the expense necessarily incurred in said proceeding. It claims a total of 644-3/4 hours spent in such services. Among the items of services listed in said petition and claimed to have resulted in benefit to the trust estate by the decree of July 2, 1943, are:

"(c) All of Class A certificates issued to Paul C. Loeber by reason of the assignment to him by Angelina Leight of her interest in and to a sum of \$100,000 excepting certificates 7 and 17, were cancelled.

(d) All of the stock certificates which are assigned and claimed by John G. Pross were declared by the decree to be cancelled.

44087

WILLIAM P. WOOD, JR., and WILLIAM P. WOOD, JR.,
Executive of the State of Georgia
Clement & Son, Georgia
Atlanta, Ga.

PAUL O. WOOD, JR.,
Executive,
Atlanta, Ga.

URAGE J. WOOD, JR.,
Executive,
Atlanta, Ga.

WILLIAM P. WOOD, JR.,
Executive,
Atlanta, Ga.

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were cancelled.

(b) All of the same of the same of the same
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declared by the same of the same of the same.

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(e) 'A' certificates issued to Paul C. Loeber for \$10,000.00 alleged expenses were cancelled.

(f) A personal judgment against Paul C. Loeber in the amount of \$37,505.82 was procured."

The decree allowing the fees in question made a lump sum allowance. The unpaid services were found by the decree to be reasonably worth \$5,000. This court in Hopkins v. Loeber, et al., 323 Ill. App. 652, reversed the decree of July 2, 1943, involving the items above listed in (c) to (f) inclusive, and held that plaintiffs were not entitled to a decree as to said items. There could be no benefit resulting to the trust estate from the services rendered in connection with those items, and there can be no recovery for such services. Since the allowance in the decree is not segregated as to the other items listed in said petition, we are in no position to pass upon the value of the services with respect to them. Plaintiffs are entitled to recover as to such other items as well as the necessary outlay for prosecuting the cause, and there should be proof offered upon a further hearing as to the value of such other services.

The underlying theory of allowance for fees for services rendered and claimed to result in benefit to a trust estate is that such trust estate has been preserved, protected or its common fund increased or created by the services so rendered. First Nat'l. Bank v. LaSalle-Wacker Bldg. Corp., 280 Ill. App. 188, 197, and cases there cited.

It follows from what we have said that the decree appealed from must be reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

Niemeyer, P. J., and O'Connor, J. concur.

44103

332 I.A. 443¹

ANNA PHILLIPS,
Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment in favor of plaintiff for \$9,000, in an action for personal injuries. The grounds urged for reversal of the judgment are: (1) that plaintiff was guilty of contributory negligence; (2) the refusal to give instructions 1 and 3 requested by defendant; (3) the denial of defendant's motions for a directed verdict and for a new trial after verdict.

It appears from the evidence that plaintiff about 8 o'clock in the evening of November 30, 1945, was walking with her niece in Webster Avenue west of Halsted Street, on the north sidewalk of Webster Avenue. She stepped into a hole in the sidewalk, which caused her to fall and sustain the injuries complained of. She had been to the drug store at the northwest corner of Halsted Street and Webster Avenue. The only street lighting in the vicinity of the defective sidewalk was on the south side of Webster near the alley west of Halsted, and another street lamp at the southeast corner of Halsted and Webster. There was an electric sign in front of the drug store. The accident happened at a point about 45 feet west of the building line of Halsted Street.

There is conflict in the testimony as to whether, at the point of the accident, it was light enough for a pedestrian walking along the sidewalk to clearly observe the condition

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of the sidewalk. Plaintiff lived a short distance from the place of the accident, and had used this sidewalk about once a month prior to the accident and had seen the several holes in the sidewalk on occasions prior to the accident. She testified that she was looking straight ahead and did not observe the hole into which she stepped. At the time of the accident, plaintiff, about 61 years of age, was employed and earned \$33.00 a week.

No point is made by the defendant on this appeal as to the injuries sustained by plaintiff or as to the size of the verdict.

The primary question is whether the plaintiff, having passed over this sidewalk many times before the accident and knew of the defective condition of the sidewalk, could, under such circumstances, be chargeable with contributory negligence to bar her right of recovery. If we can say, as a matter of law, that such knowledge on the part of plaintiff of the defective condition of the sidewalk constitutes contributory negligence, then we agree with the defendant that the trial court should have directed a verdict. On the other hand, if it is only a circumstance which a jury has a right to take into consideration together with all the other facts and circumstances in the case, to determine whether plaintiff was guilty of contributory negligence, then we have no right to interfere with the verdict of the jury upon that question, unless it be against the manifest weight of the evidence.

In Orban v. City of Chicago, 313 Ill. App. 144 (Abst.), plaintiff had used the defective sidewalk on an average of twice a week and was familiar with it. The point there raised was that plaintiff was not in the exercise of due care. We there held the question to be one for the jury, and a verdict under such facts was not against the manifest weight of the evidence.

3.

In City of Chicago v. Babcock, 143 Ill. 358, at p. 363, it was said:

"A person passing along a sidewalk in a city is required to use ordinary and reasonable care and diligence to avoid danger, but what is such ordinary and reasonable care depends upon the circumstances of each particular case, and is a question of fact for the jury. A pedestrian upon such sidewalk may ordinarily assume that the sidewalk is in a reasonably safe condition for travel. To hold that such person is absolutely bound to keep his or her eyes constantly fixed on the sidewalk in a search for possible holes or other defects, would be to establish a manifestly unreasonable and wholly impracticable rule."

In Village of Clayton v. Brooks, 150 Ill. 97, the evidence disclosed that the plaintiff knew of the defect in the sidewalk three or four weeks before the accident, but claimed at the time of the accident it was too dark to see or distinguish anything on the sidewalk and that the night was a dark and cloudy one. It was there contended that because of plaintiff's knowledge of the condition of the walk, she was guilty of contributory negligence. At p. 105 the court said:

"The law is, we think, well settled, that knowledge of the defect in the sidewalk, by the person injured, before he goes upon the same or before the injury, does not per se establish negligence upon his part."

In the instant case, the trial court correctly decided against the defendant upon this question.

We have examined defendant's instructions 1 and 3 refused by the trial court. The court properly refused them, because instructions 3 and 14, given, sufficiently covered the subject matter embodied in the refused instructions.

In National Enameling and Stamping Co. v. McGorkle, 219 Ill. 557 at p. 562, the court said:

"The court is not required to give to the jury more than one instruction upon a particular subject, and the fact that the court gives to

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the jury, where two or more instructions are presented upon the same subject, the instruction which is least favorable to the party offering them, is not error."

The case was fairly submitted to the jury, and the verdict is not against the manifest weight of the evidence. The judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, P. J., and O'Connor, J., concur.

the jury, where two or more instructions are presented upon the same subject, the instruction which is least favorable to the party offering them, is not error."

The case was fairly submitted to the jury, and the verdict is not against the weight of the evidence. The judgment of the Superior Court is affirmed.

JOSEPH W. WILLIAMS.

Attorney, R. J. W. O'Connor, Jr., counsel.

44142

332 I.A. 443

THE LAWNDALE NATIONAL BANK OF CHICAGO,)
a National Banking Corporation,)
Appellee,)

v.)

CARRIE E. BERNING and WALTER N.)
LANGKNECHT,)

Defendants,)

ON APPEAL OF WALTER N. LANGKNECHT,)
Appellant.)

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment in favor of plaintiff, against defendants, in the Municipal Court of Chicago, based upon a promissory note allegedly signed by both defendants. The note contained a confession of judgment clause authorizing the entry of such a judgment. Defendant Langknecht filed a petition to vacate the judgment entered by confession. Upon a hearing of said petition, the court allowed defendant Langknecht to appear and defend, and set the cause for hearing upon its merits, the judgment to stand as security. The defense to the note by defendant Langknecht was a denial of the execution of the note; that the same was a forgery as to him, and that the filing of the claim on said note was a fraud upon the court. Upon a final hearing of the cause on its merits, the court found in favor of the plaintiff. Defendant Langknecht only appeals.

✓ The one issue before the court was whether the purported signature of defendant Langknecht was his signature.

On behalf of plaintiff, an officer of the bank testified that the note was signed at the bank by both defendants in his presence. A handwriting expert, testifying on behalf of plaintiff from samples of defendant Langknecht's handwriting, stated in his opinion the signature on the note was

THE LAWYER, J. L. BROWN, JR., OF CHICAGO,
a National Bar Association member,
has been admitted to the bar of the
Court of Appeals for the Seventh Circuit,
Chicago, Illinois, by the Chief Justice,
and is now practicing law in Chicago.
He is a member of the American Bar Association,
the Illinois Bar Association, and the Chicago Bar Association.

CHICAGO, ILL.,
JANUARY 1, 1914.

The undersigned, J. L. Brown, Jr., of Chicago, Illinois, a National Bar Association member, has been admitted to the bar of the Court of Appeals for the Seventh Circuit, Chicago, Illinois, by the Chief Justice, and is now practicing law in Chicago. He is a member of the American Bar Association, the Illinois Bar Association, and the Chicago Bar Association.

The undersigned, J. L. Brown, Jr., of Chicago, Illinois, a National Bar Association member, has been admitted to the bar of the Court of Appeals for the Seventh Circuit, Chicago, Illinois, by the Chief Justice, and is now practicing law in Chicago. He is a member of the American Bar Association, the Illinois Bar Association, and the Chicago Bar Association.

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2.

that of defendant Langknecht.

Defendant Langknecht testified that he was never in the bank, never saw this officer, never signed the note, and that the signature is not his. Defendant Berning testified that her son, defendant Langknecht, was never near the bank on the occasion in question; that he did not go to the bank with her; that her son did not sign the note; and that the purported signature of defendant Langknecht, on the note, is not his signature.

In rebuttal, plaintiff called William S. Newburger, a member of the bar, as a witness. It appears from his testimony that defendant Langknecht consulted him with respect to having the judgment against him, by confession, vacated. It is now urged by defendant that the court should have excluded some of his testimony on the ground of privileged communication between attorney and client. The testimony he gave with respect to defendant Berning cannot now be complained of, because the judgment by confession as to her was not vacated, and she does not appeal from that judgment. As to defendant Langknecht, Newburger was asked, on direct examination, with respect to the signature on the note sued upon; "Mr. Runke: I hand you Plaintiff's Exhibit 1 in evidence, and ask you if that appears to be his signature, there, from your experience? Mr. Gager: I object to that, there has been no foundation laid and he isn't qualified. He hasn't been qualified as to whether or not he had knowledge of his handwriting. The Witness: I have had occasion to observe his handwriting from time to time. Based on that observation and the signature before me, I have an opinion as to the genuineness of that signature. My opinion is that it is his signature."

No objection was made to this question upon any ground of privileged communication, nor was there any motion to

that of defendant Langknecht.

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In rebuttal, Plaintiff called William S. Newburger,

a member of the bar, as a witness. It appears from his testi-

mony that defendant Langknecht consulted him with respect to having the judgment against him, by confession, vacated. It is now urged by defendant that the court should have excluded some of his testimony on the ground of privileged communication between attorney and client. The testimony he gave

with respect to defendant Berning cannot now be complained of, because the judgment by confession as to her was not vacated, and she does not appeal from that judgment. As to defendant Langknecht, Newburger was asked, on direct examination, with respect to the signature on the note sued upon; "Mr. Burke:

I hand you Plaintiff's Exhibit I in evidence, and ask you

if that appears to be his signature, there, from your

experience? Mr. Burke: I object to that, there has been

no foundation laid and he isn't qualified. He hasn't been qualified as to whether or not he had knowledge of his hand-

writing. The witness: I have had occasion to observe his

handwriting from time to time. Based on that observation

and the signature before me, I have an opinion as to the

genuineness of that signature. My opinion is that it is

his signature."

No objection was made to this question upon any ground

of privileged communication, nor was there any motion to

3.

strike out the testimony upon that ground. The objection of privilege cannot now be raised for the first time. There was no other testimony elicited from this witness on direct examination, as affecting defendant Langknecht, which would be objected to on the ground of privileged communication.

The evidence in our judgment abundantly supports the finding of the court, and the finding is therefore not against the manifest weight of the evidence.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Niemeyer, P. J., and O'Connor, J., concur.

2.

strike out the testimony upon that point. The objection of privilege cannot now be raised for the first time. There was no other testimony elicited from this witness on direct examination, as affecting defendant Langbehn, which could be objected to on the ground of privileged communication.

The evidence in our judgment abundantly supports the finding of the court, and the finding is therefore not against the weight of the evidence. The law must be applied as it is, and not as it might be.

affirmed.

Wheeler, J., and Wood, J., concur.

JACK and JILL PLAYERS, a Corporation not for profit,
Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation, and JOHN C. PRENDERGAST, Police Commissioner of the City of Chicago,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

279

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint in chancery to enjoin defendants from hampering, molesting, disturbing, and hindering plaintiff in the operation of a vocational school. After the issue was joined the case was referred to a master in chancery who took evidence, made up his report and recommended an injunction as prayed for. Objections were overruled, they were ordered to stand as exceptions, and after hearing, they were overruled by the chancellor and a decree entered in accordance with the recommendations of the master. Defendants appeal.

The sole question for decision is whether plaintiff was required under the ordinance of the City of Chicago to obtain a license before it was authorized to conduct the entertainments which it produced in connection with the school. In the trial court plaintiff took the position that the ordinance was not applicable and that no license was required while the defendant City and its officials contended to the contrary. No brief has been filed in this court on behalf of plaintiff.

The record discloses that plaintiff was incorporated (not for profit) by the State of Illinois, August 6, 1946, "To operate and conduct a training school for speech and

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[illegible][illegible]

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• "A" - 70' - 1990

• 1101 - 1111 Trindade

(5) I, O. J. [unclear], declare to each one of them, for ten

[illegible]

2.

theatre arts." This was the same business in which Marie Agnes Foley had been engaged for many years before the incorporation and afterwards she continued to operate in the same manner. The school was carried on for the purpose of teaching children from the ages of 4 to 18 years in dramatic art and histrionics and for the last five years it had been located at 180 East Delaware Place, Chicago. The evidence further discloses, and the master and chancellor found that plaintiff teaches the children "dramatic art, speech and microphone technique in connection with which studies are the simulation of and actual performance by the students of various plays and dramatic exercises; that for the purpose of practical experience it is advisable that such exercises and performances be conducted before an audience to get the reactions of the audience and of the students during the simulated performance." That subscriptions were sold to the parents of the students and to their immediate family and friends. That performances by the students are given from time to time at which their parents and relatives appear. That subscription tickets were sold at the beginning of the season for \$10 but later in the season individual tickets would be sold for \$1 each. That relatives and friends are the only ones to attend the performances other than educators and members of organizations such as Off The Street Club, Boys' Club, Associated Charities and Orphan Asylums who are admitted without charge. That each student pays \$10 per month or \$15 for 2 in one family. That on July 23, 1946, about 11 o'clock in the morning, an investigator of the License Bureau of the City of Chicago, went to the premises at 180 East Delaware Place while an instruction period was in progress.

The master and chancellor found (while the evidence

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theatre art." This was a new phase in the history

Agnes Foley had been engaged for many years before the

incorporation and it was not until after the war that

the same matter. The result was a series of new the purpose of

technical children from the age of 10 to 15 years in domestic

art and domestic science and the result was a new type of

located at 10 West Belmont St., Chicago, the evidence

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Club, Boy's Club, Girl's Club and Girl's Club

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1945, result of the new type of domestic

the license number of the new type of domestic

premises at 10 West Belmont St. Chicago, the evidence

period was in progress.

The master and chancellor found while the evidence

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as to what took place is somewhat complicated) that the investigator did not enter the school through the door which the patrons used. That he spoke to Miss Foley who was in charge, who was talking on the telephone at the time, and purchased a ticket for \$1. That thereupon the investigator served Miss Foley with notice that she was violating section 104-3 of the Ordinances of the City of Chicago. That shortly thereafter she was served with the notice to appear before the License Court for a violation of the ordinance in a quasi-criminal proceeding. The case was heard before Judge Charles S. Dougherty, of the Municipal Court, and after hearing, was dismissed and Miss Foley was discharged. Afterwards plaintiff was notified by defendant City, that it would not be permitted to give its entertainments without a license and a few days later, defendant Chief of Police, through his agents and deputies entered the premises and compelled plaintiff to discontinue its anticipated performance and exercises.

The ordinance of the City of Chicago that defendants contend plaintiff was violating is found in Chapter 104 of the Revised Municipal Code of Chicago entitled, "Amusements." Sec. 104-1 of the ordinance provides: "The word 'Amusement' is hereby defined to mean and include any theatrical, exhibition, show, and similar entertainment offered, operated, presented, or exhibited for gain or for admission to which the public is required to pay a fee." And sec. 104-3 of the ordinance provides that "No person, either as owner, lessee, manager, officer, or agent, shall give, conduct, or produce, present, or offer any amusement specified in the preceding section without first having obtained a license therefor."

The master further found, and his finding was approved by the chancellor, "that plaintiff does not either as owner,

as to what took place is somewhat complicated) that the investigator did not enter the school through the door which the patron used. That he came to the door who was in charge, who was talking on the telephone at the time, and purchased a ticket for \$1. That throughout the investigation served Miss Foley with notice that she was violating section 104-3 of the ordinances of the City of Chicago. That shortly thereafter she was served with the notice to appear before the Board of Health for violation of the ordinance in a criminal proceeding. The case was heard before Judge Connelley, Magistrate of the Criminal Court, and after hearing, the case was set aside and the case was dismissed. A judgment of acquittal was entered by the court, that it was the duty of the Board of Health to give the notice without a license, and that the defendant United of Police, through its agents, violated the ordinance, premises and covered the case to the Board of Health, dated performance and expenses.

The ordinance of the City of Chicago that defendant contend plaintiff was in violation of, Chapter 104 of the Revised Municipal Code of Chicago entitled, "Amusement," Sec. 104-3 of the ordinance provides: "The ordinance is hereby defined to mean and include any the critical exhibition, show, and similar entertainment offered, presented, or exhibited for gain or for exhibition to which the public is required to pay a fee." And sec. 104-3 of the ordinance provides that "No person, either as owner, lessee, manager, officer, or agent, shall give, conduct, produce, present, or offer any amusement specified in the preceding section without first having obtained a license therefor."

The master further found, and his finding was approved by the chancellor, "that plaintiff does not either as owner,

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lessee, manager, officer or agent, give, conduct, produce, or offer any amusement, theatrical exhibition, show or similar entertainment for gain or for admission to which the public is required to pay a fee."

We think it clear that the evidence was wholly insufficient to show that plaintiff was selling tickets to the public, even if we assume that the testimony of the investigator who purchased a ticket on July 23, 1946, was literally true. And we are further of opinion that the master and chancellor were correct in finding in effect that plaintiff did not sell tickets which permitted the public to attend the performances; but we are unable to agree that the "theatrical exhibitions" were not conducted for gain by Miss Foley. As above stated, the students were charged tuition of \$10 per month or \$15 for 2 in one family and that the parents, relatives and friends of the students purchased "subscription tickets" for \$10 at the beginning of the season and later in the season such tickets were sold to them for \$1 for each performance. The charge made for subscription tickets brings plaintiff within the definition in the ordinance and requires plaintiff to have a license. Miss Foley testified she retained \$75 per week and paid teachers whom she employed to assist her, weekly sums. The fact that Miss Foley, who had been conducting the school for several years, caused the plaintiff corporation to be organized, we think is wholly immaterial under the facts disclosed, for she continued to operate the school as she had done for many years even after the incorporation. The obtaining of the charter, was, at most, merely colorable as nothing was done under it.

For the reasons stated, the decree of the Superior court of Cook county is reversed and the cause remanded to dismiss the complaint for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer, P. J., and Feinberg, J., concur.

[illegible]

the same, containing 1000 cc. of water, was added to

DATE OF RECEIPT BY THE U.S. DEPT. OF JUSTICE

1. The first step is to identify the problem or question that needs to be answered.

VERIFIED BY: _____ DATE: _____

(c) subject matter covered by the above provisions

the number of people who are employed in the

1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 26

100-443887-100

FIELD NO. 70-168

1. The following information is being furnished to you for your information:

... ..

1972-1973

* JUDGE TO THE FBI BUREAU AND

44151

WILLIAM H. MURPHY,
Appellee,
v.
NORINE QUINLAN and JAMES J.
QUINLAN,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

332 P.A. 581

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment in a forcible detainer action ousting them from possession of premises in which they were conducting a tavern under a written lease.

It is difficult to treat this appeal seriously. It is one of too many cases recently brought to this court the sole purpose of which appears to be retention of possession of the premises pending an appeal. In this case the first objection raised by defendants is the alleged failure of plaintiff to comply with paragraph 1, section 6, Federal Rent Regulations for Housing, as amended. This objection is withdrawn in the reply brief, plaintiff having suggested, what must have been known to defendants' counsel, that the Federal Rent Control Act did not apply to commercial property. It is uncontroverted that defendants failed to pay the January 1947 rent and that defendants' check for such rent was returned by the bank because of insufficient funds.

The sole remaining defense, after withdrawal of the alleged defense of failure to comply with the federal rent regulations, is that plaintiff failed to notify the defendants that their check had been dishonored by the bank, and certain sections of the Negotiable Instruments Act having no application to the present case are cited.

WILLIAM H. HAY

v.

JOHN H. HAY
JURY

MR. HAY

detention of the... which... it is one of the... also... of the... objection... ability to... rent... is... what... Federal... It is... January... was... The... alleged... regulators... agents that their... and certain... having no...

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Defendants are chargeable with knowledge of the condition of their bank account when drawing checks, and, notwithstanding they claim to have had on deposit in the bank in a savings account the sum of \$8,000, the record is silent as to any offer to pay the January rent admittedly due.

The judgment is affirmed.

AFFIRMED.

Feinberg and O'Connor, JJ., concur.

44126

EUGENE WRIGHT and GOLDBIE WRIGHT,

Appellants,

v.

JOHN SPASS, MARJA SPASS and JOHN
A. CERVENKA, Jr., as Master in
Chancery of the Circuit Court of
Cook County, Illinois,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

332 L.A. 582

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a complaint filed in the Circuit Court of Cook County by Eugene Wright and Goldie Wright against John Spass, Marja Spass and John A. Cervenka, Jr., a Master in Chancery of that court, plaintiffs alleged that on October 19, 1935 Clarissa Langlois, then the owner of certain described real estate located in Chicago, made, executed and delivered to plaintiffs "her certain contract" in writing, in and by which she agreed to convey to plaintiffs, for a valuable consideration, all her right, interest and title to the real estate; that the contract "has been lost, mislaid or destroyed so that the same cannot be attached hereto and made a part hereof"; that "immediately upon the making and delivering of said contract to the plaintiffs," they "did take possession of said premises and have at all times since the said 19th day of October, 1935, and are now in possession of said above described premises"; that they have "fully complied and carried out all of the terms and conditions of said contract to be performed by them"; that on February 23, 1937 a bill of complaint was filed in the Circuit Court, #37 C 1848, purporting to be signed and sworn to by one George McEwen as plaintiff, and naming as defendants Clarissa Langlois, Chicago Title & Trust Company, Thomas J. Courtney, States Attorney of Cook County, Eugene Massey, John J. Dunn Coal Company, Noble J. Puffer, County Superintendent of Schools of Cook County, The County

of Cook, a Municipal Corporation, John Doe Kennedy, Henry Lloyd, James Harrison, Charlie Robertson, John Doe Thompson and "Unknown Owners"; that in the latter bill of complaint it was alleged that George McEwen was the owner of a promissory note for "\$20,500," made and executed by Mary C. Barrett on March 1, 1924, which note was secured by a trust deed of even date therewith, conveying the real estate to the Chicago Title & Trust Company, as trustee; that the latter bill further alleged that default in the payment of the note had been made; and that the plaintiff therein, George McEwen, prayed that the equity of redemption in the real estate be foreclosed and that the real estate be sold to satisfy the amount due on the note.

The complaint further alleges that on October 14, 1938, pursuant to a petition by George McEwen, the Circuit Court in cause #37 C 1848 entered an order finding that he, McEwen, had no beneficial interest in the "notes" and trust deed; and that on March 6, 1944, pursuant to a petition filed in cause #37 C 1848, the court entered an order substituting John Spass as plaintiff therein. Plaintiff further alleged that on March 6, 1944 there was "no such person living or in being as John Spass; that the John Spass mentioned in said petition was a mere fiction"; that plaintiffs were not made parties defendant to the original or amended bill to foreclose; that no summons was issued or served upon them; that the attorney for plaintiff in Circuit Court case #37 C 1848 and the attorney who "filed the amended bill of complaint therein on behalf of the said fictitious John Spass" well knew at the time of the filing of the bill of complaint and the amended bill of complaint that plaintiffs therein were "in possession of the above described real estate under and by virtue of the aforesaid contract." In their complaint plaintiffs say that the failure to make them parties defendant in cause #37 C 1848 was a fraud upon them and upon the

of Cook, a partnership, John and Kennedy, Henry and
James Harrison, William Robertson, and the late Mrs. Harrison
Owners; that in the latter part of 1934 it was alleged
that George Harrison was the owner of a 1/2 interest in the
lands and executed by Harry A. Harrison on 1/1/35, which were
was secured by a first deed of trust (hereinafter), conveying the
real estate to the said Harry A. Harrison, and that the
the latter will hereinafter be referred to as the grantor of the
note had been made; and that the said Harry A. Harrison,
prayed that the court at its discretion should appoint a receiver
and that the real estate of the said Harry A. Harrison be sold
note.

The court, in its order of 1/1/35, on 1/1/35, 1935,
pursuant to a petition filed by the said Harry A. Harrison in cause
No. 1 of 1935, ordered that the said Harry A. Harrison, and his heirs,
legal interest in the said real estate, and that on 1/1/35, the court
1934, pursuant to a petition filed by the said Harry A. Harrison,
entered an order appointing a receiver of the said real estate.
plaintiff further stated that the said Harry A. Harrison was not such
person living on the said real estate; that the said Harry A. Harrison
stated in the said petition that the said Harry A. Harrison were
not made parties defendant in the said petition or answer filed to fore-
close; that no answer was filed to the said petition; that the
attorney for plaintiff in the said cause was the said Harry A. Harrison and the at-
torney who filed the petition was the said Harry A. Harrison on behalf
of the said Harry A. Harrison, and that the said Harry A. Harrison
filing of the bill of foreclosure and the amended bill of foreclosure
that plaintiff therein were to be removed to the above described
real estate under and by virtue of the aforesaid contract. In
their complaint plaintiffs say that the failure to make them parties
defendant in cause No. 1 of 1935 was a fraud upon them and upon the

court.

Plaintiffs allege that on April 12, 1944 a decree of foreclosure was entered in Circuit Court case #37 C 1848; that Master in Chancery Cervenka was directed to make the sale and to deliver to the purchaser a certificate of sale; that on May 10, 1944 he offered the real estate for sale and made "a purported sale" thereof to John Spass and Marja Spass, his wife, as joint tenants; that on May 26, 1944 an order was entered in that case approving the report of sale; that a certificate of sale was accordingly issued; and that Master Cervenka has "threatened" to issue a deed for the real estate to "some person purporting to be John Spass," his agent or attorney, unless restrained therefrom. Plaintiffs ask that a decree be entered vacating and holding for naught the decree in case #37 C 1848, vacating the order therein approving the report of sale, declaring the certificate of sale to be void, and enjoining Master Cervenka from issuing a deed to the real estate.

A motion to "strike and dismiss" the complaint for "want of jurisdiction and want of equity" was filed in behalf of John Spass and Marja Spass on the following grounds: (1) that on April 12, 1944 a decree was entered in cause #37 C 1848 in which the court "expressly reserved jurisdiction of the parties" and the subject matter thereof; (2) that the complaint fails to allege facts; (3) that although it alleges a contract it fails to attach a copy; (4) that it "misrepresents the facts as to where the contract is or what became of the contract"; (5) that it fails to state what kind of possession was taken in 1935 and "failed to state the fact that prior to the date of sale and transfer of the premises to the intervening petitioners that they had defaulted and abandoned the contract, and prior to the filing of the suit to foreclose the trust deed and notes, Eugene Wright had been employed as custodian of the premises for the owner of the premises, and had never been in actual physical

possession of said premises"; (6) that the complaint "misinformed the court in stating it had carried out all the terms and conditions of said contract to be performed by them in that the contract to which they referred provided, among other things, that they were to assume and pay the mortgage which was foreclosed and they did not pay any parts of the principal or interest, and by their bill they admitted that it was in default at the time of the filing of suit #37 C 1848"; (7) that the petition of George McEwen in cause #37 C 1848 stated that "John Spass was the owner of the notes sought to be foreclosed and that no one else had any interest in them"; (8) that the allegation of the complaint that on March 6, 1944 there was no such person living or in being as John Spass and that he was a mere "fiction" was a "mere supposition without foundation in fact, substance or law"; and (9) that the court was without jurisdiction to hear or determine any allegations stated in the complaint "because the same subject matter is pending before this court in suit #37 C 1848."

Concurrently with the filing of their motion to strike and dismiss, John Spass and Marja Spass also filed a petition alleging that on February 11, 1936 they entered into a contract with the Mutual Management Company of Chicago to acquire title to the Chicago real estate in exchange for a farm in Adams County, Wisconsin; that such contract provided that in consideration of the "transfer" of the Wisconsin farm, the Mutual Management Company of Chicago would transfer, assign and sell to them a first mortgage evidenced by principal promissory "notes" in the aggregate of "\$27,500" secured by a trust deed on the Chicago real estate; that the Mutual Management Company would "foreclose" the trust deed and deliver to them, John Spass and Marja Spass, within six months a master's certificate of sale as shown by the terms and provisions of the contract "now ready to be offered in evidence as petitioners'

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...\$25,000 ...
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...master's ...
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exhibit #1"; that on February 27, 1937 cause #37 C 1848 was filed in the Circuit Court to "foreclose the trust deed and notes"; that Palmer Dawes was appointed receiver for the premises; that prior to the filing of the bill to foreclose Eugene Wright had been employed as "custodian of said building by the owner"; that four days prior to the filing of the bill to foreclose Eugene Wright had filed mechanics liens in which he stated that he was the "custodian" for Clarissa Langlois and the Mutual Management Company "for work and labor that he had done at their special instance and request."

The petition further alleged that prior to the time Eugene Wright was employed by the owner as custodian on October 19, 1935, he had entered into a contract to purchase the premises and to assume and pay the "first mortgage" and to expend certain moneys doing repairs; that subsequent to the making of the contract by Eugene Wright he "abandoned" it and "gave it up to the seller"; that thereafter he was employed by her as "custodian and caretaker to do certain repairs for her"; that on January 28, 1938 a decree of foreclosure was entered; that on October 14, 1938 George McEwen filed a "disclaimer in said court, which was in accordance with the provisions of the contract to the petitioners, declaring that he, or no one else had any interest in said premises except John Spass, the holder and owner of said notes and was thereby discharged by the court"; that in January, 1944 the petitioners appeared before a chancellor in the Circuit Court "for leave to be substituted as parties plaintiff"; that the court set the cause for hearing; that after a full hearing a decree was entered on April 12, 1944; that on May 10, 1944 the master sold the premises to petitioners, who were the highest bidders, for cash; that a master's certificate was issued; that on August 10, 1945 the period of redemption expired; that subsequent to the expiration of the period of redemption, Eugene Wright and Goldie Wright made "divers

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motions in the Circuit Court in case #37 C 1848," which were "overruled, stricken and dismissed" by the chancellor in October, 1946; that in July, 1946 plaintiff filed a complaint in the Superior Court "which was and is the same complaint that is before the court now"; that the case was transferred from the Superior Court to the Circuit Court; that "thereafter nothing was done except the plaintiffs and their attorneys stated that if John Spass was produced that they would dismiss the entire proceeding, and that if he were not produced they would immediately proceed with their case"; that plaintiffs "did nothing until after October 15, 1946"; that on that day defendants' motions to strike and dismiss were presented; that plaintiffs were granted a postponement of 10 days, during which time plaintiffs "went into the Circuit Court and filed the bill now pending."

The petition further states that Eugene Wright "is not now nor has he been in active possession of said premises, if at all, since prior to February, 1936"; that in 1935 he was employed by the agent of the owners of the premises as caretaker and custodian and to do certain repairs on the premises; that subsequent thereto he remained as such caretaker and custodian in the employ of Palmer Dawes, who was the receiver appointed by the court in case #37 C 1848; that after the discharge of Palmer Dawes as receiver "there was no one in possession of said premises except vagrants, squatters and trespassers until sometime in the year 1942"; that in 1942 Eugene Wright and Goldie Wright "came into the Superior Court and filed case #42 S 17109, asking for specific performance of a contract that was not in existence"; that plaintiffs were aware of the foreclosure of the mortgage on the premises; that Eugene Wright was employed by the receiver, Palmer Dawes, worked for him and was paid by him for the services he rendered as custodian; that subsequently he was employed by Franklin Mutual

Insurance Company and Clarissa Langlois, "the owners of said premises"; that he filed mechanics liens for work and services performed at their special instance and request; that at the time of the filing of case #37 C 1848 there was publication for unknown owners; that Eugene Wright knew that the suit was pending; that he did not intervene; that the court "has no jurisdiction by reason of the fact that in the decree entered April 12, 1944 the court specifically reserved jurisdiction of the subject matter"; that "if plaintiffs had any rights they could and must be adjudicated in suit #37 C 1848"; that Eugene Wright is a receiver under and by virtue of an order of the Superior Court; that there is a deficiency decree of \$11,000; that the rents and profits are being squandered; and that the building is being mismanaged. The petition prays that a decree be entered dismissing the cause for "want of jurisdiction and for want of equity" at plaintiffs' costs, and that the master be directed to issue the deed.

Master Cervenka answered, stating that by virtue of the decree entered April 12, 1944 in Circuit Court case #37 C 1848 he sold the real estate on May 10, 1944 to John Spass and Marja Spass, his wife, as joint tenants, they being the successful bidders at the sale; that he issued a master's certificate therefor; that a copy of the certificate was filed for record in the recorder's office on May 25, 1944; that the purchasers, their representatives and assigns became entitled to a master's deed for the premises on August 11, 1945; and that no deed had up to the time of the answer been issued, nor had any redemption been made up to the date of the filing of the answer. Master Cervenka asked that the court instruct and protect him in the matter of the issuance of the deed.

On December 23, 1946 defendants moved to strike and dismiss the cause "for want of jurisdiction and of equity" based

on the written motion and petition. The chancellor set the "motion and petition for hearing on February 10, 1947." An order entered February 10, 1947 states that the "court having considered the bill of complaint, the motion and petition to strike and dismiss and the arguments of counsel for all parties, finds that it has jurisdiction of the parties and the subject matter hereof," and "ordered, adjudged and decreed that the motion to strike and dismiss the bill of complaint" be sustained and that the complaint be dismissed. The record does not show that plaintiffs elected to stand on their complaint. They appealed from the decree dismissing the complaint and asked that the decree be reversed and the cause remanded with directions that defendants be required to answer the complaint.

All reasonable presumptions are indulged in favor of the correctness of the decree. Error is never presumed on appeal. The burden of showing error in the record is on the appellant. The decree recites that the chancellor considered the complaint, the motion and petition and heard the arguments of counsel. The motion to dismiss and the petition were anomalous pleadings and the procedure followed was irregular. The motion to dismiss combined an attack on the complaint with an answer. The petition recited matters beyond the four corners of the complaint. The court considered the complaint, the motion to dismiss and the petition. The record does not show any objection to this procedure. It will be observed that many of the factual allegations in the petition are matters of record in the Circuit Court. There was no motion to dismiss the petition and no answer thereto. While it is proper to file a motion to strike certain parts of the complaint and to answer other parts, it is improper practice to answer as to matters sought to be stricken. A motion to dismiss or to strike proceeds upon the ground that admitting the facts stated in the bill to be true, the plaintiff is not entitled to the relief sought. The motion admits

all allegations well pleaded. It does not admit conclusions of law or conclusions of fact unsupported by allegations of specific facts upon which such conclusions rest. Upon the hearing of a motion to dismiss or to strike, the allegations of the complaint are to be taken most strongly against the pleader. Plaintiffs did not include in the record a report of proceedings at the hearing.

The complaint states that Clarissa Langlois was the owner of the real estate, ^{and that} in October, 1935 she entered into a contract with plaintiffs to convey to them, for a valuable consideration, all her right, title and interest in the real estate. The contract had been lost, mislaid or destroyed. Plaintiffs do not plead or attach a copy of the contract, or say that a copy is unavailable, nor do they state the terms of the contract. We gather from the complaint, however, that the agreement provided that they would take title subject to an indebtedness of \$20,500, represented by promissory notes and secured by a trust deed. In February, 1937 George McKwen, the holder and owner of the notes secured by the trust deed, filed a complaint to foreclose the equity of redemption. On March 8, 1944 the court ordered that John Spass be substituted as the plaintiff. Plaintiffs in the case at bar, Eugene Wright and Goldie Wright, were not made parties to the foreclosure suit. On April 12, 1944 a decree of foreclosure was entered. On May 10, 1944 Master Cervenka sold the real estate to John Spass and Marja Spass as joint tenants. On May 26, 1944 the sale was confirmed.

Plaintiffs alleged performances of the contract. Though the document called the contract be lost, plaintiffs could nevertheless plead the contents thereof. Without knowing the terms of the contract, a person reading the complaint could not know what contract plaintiffs performed. Plaintiffs assert that their complaint is not founded upon the written contract and that the con-

all allegations well stated. It seems to me that conclusions of
law or conclusions of fact suggested by allegations of negligence
arise upon which such conclusions may be drawn. From the hearing of a
motion to dismiss or to strike, the defendant of the complaint
are to be taken as admitting the facts stated. Plaintiff did
not include in the record a copy of the proceedings of the hearing.
The complaint states that the defendant, who is the
owner of the real estate, has agreed into a con-
tract with Plaintiff to sell the real estate. Plaintiff con-
siders, all her rights, title, interest in the real estate. The
contract has been made, and Plaintiff is entitled to her
pled or reach a copy of the contract, and that a copy is un-
available, nor a copy is in the hands of the defendant. It is
from the contract, and Plaintiff is entitled to her copy. They
would take this as a copy of the contract, and Plaintiff is
entitled to a copy of the contract. In Plaintiff's
1937 George Brown, Plaintiff is entitled to a copy of the contract
the first copy of the contract. Plaintiff is entitled to a re-
production of the contract. On March 1, 1937, Plaintiff spent in
reproduction of the contract. Plaintiff is entitled to a copy of her
Eugene Wright and Joseph Wright, who are parties to the
foreclosure suit. Plaintiff is entitled to a copy of the
entered. On May 15, 1937, Plaintiff was advised that the real estate to
John Spens and was in the hands of the defendant. On May 20, 1937, the
sale was continued.
Plaintiff alleged that the defendant of the contract. Through
the document called the contract as lost, Plaintiff could never
thereas plead the contract. Plaintiff is entitled to a copy of
the contract, a person would. The complaint could not know what
contract Plaintiff is entitled to. Plaintiff is entitled to a copy of the
plaint is not founded upon the contract and that the con-

tract is mentioned in the complaint only to inform the court that plaintiffs have an interest in the foreclosure suit. It is obvious that the making of the contract is an essential allegation of the complaint. Whatever rights plaintiffs claim are based on the contract. Par. 2 of the complaint alleges the making of the contract; Par. 3 the taking possession thereunder; Par. 4 that plaintiffs fully complied with the terms of the contract; and Par. 10 that the attorney for plaintiffs in the foreclosure suit well knew at the time of the filing of the complaint and the amended complaint therein, that plaintiffs herein were in possession of the real estate "under and by virtue of the aforesaid contract." Plaintiffs made no effort under the discovery provisions of the Civil Practice Act and the rules to obtain the contract or a copy of it. There is no allegation by plaintiffs that the indebtedness secured by the trust deed was paid. In fact, the records of the Circuit Court show that there was a deficiency.

If we assume, for the purpose of argument, that plaintiffs were in possession and that they should have been made parties defendant to the foreclosure suit, nevertheless, it is incumbent upon them to show the basis on which they attempt to remain in possession as against the holder of the certificate of sale. This they utterly failed to do. Apparently, the chancellor was satisfied from the pleadings and from the arguments of counsel and the records of the court that plaintiffs did not have any right to remain in possession as against the purchasers at the master's sale and their assigns. The court will not set aside the decree unless plaintiffs have a right to relief based on a showing of their rights. They utterly fail to plead any right to relief.

Turning to the contention that John Spass and Marja Spass were fictitious persons, we observe that the Circuit Court

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in case #37 C 1848 entered an order substituting them as plaintiffs and that no attack has been leveled against that order. Plaintiffs cannot attack the order in a collateral proceeding. Under the record, the chancellor did not err in dismissing the complaint. Therefore, the decree of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED

LEWE, P.J., and KILEY, J, CONCUR

in case any of these persons should be found to be
guilty of any crime, the same shall be
forfeited to the State, and the same shall be
applied to the benefit of the poor of the
County in which the same shall be found to be
guilty of any crime, and the same shall be
applied to the benefit of the poor of the
County in which the same shall be found to be
guilty of any crime.

WITNESSETH

Attest

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ANGELA ERRERA,

Appellant

v.

NICHOLAS ERRERA,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

3329 A. 582²

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a divorce action. The chancellor granted plaintiff the divorce she prayed. She has appealed from the parts of the decree which determined property rights and attorney's fees.

Plaintiff, a widow, and defendant, a widower, were married June 18, 1938. No children were born of this marriage. Each party at the time of the marriage had adult children. At the time of the decree plaintiff was 58, and defendant 68, years of age. When they married plaintiff was paying on a contract for a deed to a piece of property on Homan Avenue, Chicago. They jointly managed this property until its sale about a year and a half later. They joined in the sale of the contract interest for \$500. The check for the sale price was in the names of both parties.

The proceeds of that check and \$100 furnished by defendant were used to make a down payment on a building at 3865 Flournoy Street, Chicago. This payment was made under a contract for a deed. The purchase price was \$5,200. In addition to the down payment of \$600 the parties were obliged to pay \$40 per month on the balance. When paid down to \$2,000 the deed was to be delivered to them in joint tenancy. This property was a residence when they bought it. After they took possession it was remodeled into four apartments. Until their separation April 2, 1944, they lived together in one of the apartments. Thereafter, plaintiff remained in the apartment, collected the rents, made the contract payments and met the maintenance costs.

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The issues made by the pleadings were whether defendant was guilty of the violent acts of cruelty charged; whether plaintiff was the sole owner, or both parties equal owners, of the Flournoy Street property; and whether plaintiff should have alimony, expenses and attorney's fees and a share of defendant's separate property.

The record shows that the testimony in this case was taken before Judge Lindsay in September 1944. The transcript was presented to Judge Schwaba in February, 1946. The parties stipulated by their attorneys that the decision should be based on the pleadings and the evidence in the transcript. The decree was entered July 3, 1946.

The divorce was granted plaintiff. The decree found that the parties were joint tenants and equal owners of the Flournoy Street property. It ordered a private sale between the parties to the one making the better bid. The proceeds were to be divided equally. It further found that plaintiff was not entitled to alimony and she was refused a share of defendant's separate property. She was allowed \$200 attorney's fees from defendant's share of the proceeds of the sale. Plaintiff claims the court erred in its disposition of the Flournoy Street property, in its refusal to grant her alimony and a share of defendant's property, and in its failure to grant her adequate fees. These claims present the questions on appeal. There is no cross appeal.

It will serve no purpose to relate the violent acts of cruelty committed by defendant on plaintiff. Allowance of alimony is provided for support and not to punish the offender. Buehler v. Buehler, 373 Ill. 626. The measure of the sum of alimony is the need of the wife and the ability of the husband to pay. Herriek v. Herriek, 319 Ill. 146. Plaintiff testified that she worked before her marriage, for a few months thereafter and then stopped, and that she resumed work about one and a half years after the marriage.

An employment record beginning in January 1944 and ending in August 1944 discloses that her weekly earnings ranged from \$10.59 to \$40.37. She was not able to work at the time the testimony was taken. There is nothing in the record to show whether she did or did not work during the period between the taking of the testimony and the entry of the decree. Defendant's attorney stated to the trial court that she was working at the time of the entry of the decree. We think under this state of the record it must be presumed that the court properly found no showing had been made for a need for alimony.

The record shows defendant paid \$3,000 cash before 1928 upon a \$6,000 purchase price for a two flat building owned by him on Hoyne Avenue in Chicago. It appears that he has occupied one of these flats since the parties separated and has received \$20 rent from the other flat. A mortgage on the property, defendant said at the time of the trial, was in default. The record also shows an accrual of \$1,140.62 taxes on the property and that the property was sold for the 1929 and 1933 taxes. There was evidence that defendant also owned vacant property on Ashland Avenue, Chicago. No evidence of its value or present tax status was introduced. There was evidence that he had several \$25 government bonds. The evidence is not very definite as to his employment record. After he married plaintiff he worked for four years for W. P. A. and was laid off. He worked for a couple of months during the war, just preceding the taking of the testimony in this case, making \$35 per week. There is nothing to show whether he was employed for the two preceding years. Just prior to the entry of the decree his attorney stated he was "out of a job right now." This seems to us an insufficient showing of defendant's ability to pay. We think the court properly found that plaintiff was not entitled to alimony.

to alimony.

think the court properly took into account all the facts and decided

to an alimony award. The court's decision is a fair one. It is

his attorney's duty to get the best possible result for his client.

for the best result possible. The court's decision is a fair one.

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The evidence in this case is not sufficient to establish that

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to \$40.00. The court's decision is a fair one. It is a fair

August 1944 (released from the custody of the court from 10.30

an employment record. The court's decision is a fair one. It is

This brings us to the consideration of the disposition of the Flournoy Street property. We have already related some of the facts bearing upon its ownership. The contract for its purchase is in the record. It was made March 28, 1940. It recites the purchase is being made by the parties, not as tenants in common but as joint tenants. Defendant contributed \$100.00 of his own money to the down payment under the contract. According to his testimony he made substantial improvements and repairs in converting the Flournoy Street premises from a residence to a four apartment building. Plaintiff says his work was limited to installing a bath tub and a couple of sinks. There is no evidence of anyone else doing repair work.

The record shows receipts and disbursements in the operation of the property commencing July 1943 and ending September 1944. According to this record, receipts were \$107 per month, except one, and disbursements, including the \$40 contract payments, were in excess of the rental income, for all but five months, by amounts ranging up to \$25. The deficiency plaintiff said she made up out of her own funds. Presumably plaintiff has remained in sole possession of the property since the parties separated and during the period after the testimony in this case was taken and before the entry of the decree. We assume also that she has collected the rents during this time.

We cannot say that the court should not have found that the Flournoy Street property was held in joint tenancy. Moreover, plaintiff made no case for sharing in defendant's property since she failed to prove a basis for the allowance of alimony. Her dower rights in defendant's separate property have not been disturbed. Ill. Rev. Stats. Chap. 3, Par. 173.

The allowance of attorney's fees rests in the sound discretion of the trial court. There is no adequate proof in the record on which to determine whether or not the trial court abused its discretion in making the allowance for plaintiff's attorney's fees. General statements of numbers of appearances in court, etc. are not sufficient. Under the state of the record we must presume that the allowance is right.

Under all these circumstances we think the court made an equitable disposition of the case on the record as presented to it. The decree is, therefore, affirmed.

AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

The allowance of attorney's fees rests in the sound discretion of the trial court. There is no absolute test in the record on which to determine whether or not the trial court abused its discretion in making the award for plaintiff's attorney's fees. General state courts of law, equity, probate, etc., are not sufficient. The allowance of fees is a matter to be determined by the trial court in its discretion.

Under the provisions of the Code of Civil Procedure, an equitable distribution of property is required in a divorce action. The court is to divide the property between the parties as it seems just and equitable.

Wm. J. ...

44022

THE NEW YORK CENTRAL RAILROAD
COMPANY, a corporation,

Appellant,

v.

CITY OF CHICAGO, a Municipal
corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

332 I.A. 583

MR. JUSTICE KILKEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover transportation charges of \$104.14 for a carload of coal which plaintiff alleges it delivered to defendant's Roseland Pumping Station in Chicago. The case was tried without a jury. The court found against the plaintiff and entered judgment accordingly. Plaintiff has appealed.

Plaintiff alleged that the Sahara Coal Co. shipped the coal on plaintiff's lines in its car No. 837033; that it was consigned to the Roseland Pumping Station; that plaintiff delivered the shipment at the usual place of delivery at the pumping station on November 10, 1944; and that the car was unloaded on November 10th and 11th and removed empty on November 11th. Defendant filed no pleading.

The only question presented is whether the trial court's finding, that plaintiff did not prove by a preponderance of evidence delivery of the car is against the manifest weight of the evidence. Plaintiff's motion for a new trial on that ground was denied.

Plaintiff introduced an original report dated November 9, 1944, covering plaintiff's car No. 837033. It indicates that two new wheels and an axle had been put on the car at plaintiff's 83rd Street Yard. The maker of the record testified that the repairs were completed on November 9; that the car was then in good shape; that his report card indicated that the car was

loaded at the time; and that when he next saw it on November 11th it was empty. Plaintiff introduced also a Time of Trip Report, purporting to be a record of movement of cars over plaintiff's railroad. Conductor McFadden who made the report was not available as a witness. His signature on the card was identified. The report is dated November 10, 1944. Plaintiff's assistant trainmaster testified that McFadden went to work at 7 A. M. that day; that the report indicates that cars numbered 837033, 825536 and 827292 were taken from the 83rd Street yard and delivered to the pumping station and that they were loaded at the time. On cross-examination this witness testified that the report was in the same condition at the trial as when made, except for a red cross appearing after the No. 837033. The three car numbers referred to, filled the last three of the twenty-four spaces on the record. No. 837033 appearing in space 22. The witness said he did not make the red cross on the record and that he was in charge of deliveries but had not received a receipt from defendant for delivery of the car in question. The Time of Trip Record contains symbols indicating that the car was delivered to the pumping station on November 10, 1944 and that the train which delivered it left 51st Street at 7 A. M. The pumping station is located at 104th Street. The witness said the car was taken from 83rd Street.

Plaintiff introduced a record captioned Daily Check of Cars On Track, dated November 11, 1944. This indicates car No. 837033 was partially loaded when checked at the pumping station. It shows car No. 825536 and 827292 and 847345 empty. The checker, Lau, who made the report, said he made it at 7:30 A. M., November 11th, and that he saw No. 837033 at the pumping station at 7:30 A. M. on November 10th. Plaintiff also introduced a Time of Trip Record dated November 11, 1944, made by Conductor Stanger. He

testified that symbols on the record indicated he took car No. 837033 from the pumping station to 81st Street on November 11th; that no other car was taken from the pumping station that day; that he saw car No. 837033 and handled it that day when it was taken about 2 P. M. that he did not remember seeing any cars other than 837033; and that he did not make the red cross at X which appears on the record opposite No. 837033. It will be remembered that the checker had marked Nos. 825636 and 827292 empty on November 11th.

A coal sampler and tester, McGrath, employee of defendant, identified entries in an inspector's field book made by him. These indicate that on November 10, 1944, he inspected New York Central cars, Nos. 825865, 850726 and 838293. In a marginal note opposite the last two numbers, there is a notation: "837033 did not arrive." At the bottom of the page of entries, there was a further notation: "Did not arrive 837033. Co. claims this was delivered Nov. 10, pulled Nov. 12." This witness testified that 837033 had not arrived at any time while he worked on Friday, November 10th to about 3:30 P. M. that he took samples from the other cars on that date; that he did not work again until Monday, November 13th; and that the entries were made about a week after the inspection, although the car numbers were recorded when the samples were taken.

Defendants produced a chemical engineer who testified for defendant that samples of coal delivered to pumping stations are usually received Monday of each week from the testers, who sample the cars "religiously"; that the samples come in cans on which labels are pasted containing the date, number of the car, etc.; and that the laboratory never had a sample from car No. 837033.

O'Brien, conveying engineer at the pumping station, testified for defendant that his duties included supervision of all coal handling machinery; that he received a bill of lading

testified that evidence on the record in this case was that the evidence from the records of the station in question was that no other evidence was found from the records of the station that he saw on the 27th of November, 1933, that it was taken about 11:00 A.M. on the 27th of November, 1933, at other than 27033, and that the evidence from the records of the station which appears on the record in this case is that it was remembered by the witness that the evidence from the records of the station on November 27, 1933, was that the evidence from the records of the station, identified with the evidence from the records of the station, these individuals, the evidence from the records of the station, General case, the evidence from the records of the station, opposite the evidence from the records of the station, did not arrive, the evidence from the records of the station, a further notice, the evidence from the records of the station, delivered, the evidence from the records of the station, 27033 had no, the evidence from the records of the station, November 10th to, the evidence from the records of the station, other case on, the evidence from the records of the station, November 10th, the evidence from the records of the station, the investigation, the evidence from the records of the station, evidence from the records of the station, identified, the evidence from the records of the station, for defendant, the evidence from the records of the station, are usually, the evidence from the records of the station, except the evidence from the records of the station, which labels, the evidence from the records of the station, etc.; and that the evidence from the records of the station, O'Brien, concerning evidence from the records of the station, testified for the evidence from the records of the station, all coal handling machinery, the evidence from the records of the station,

from the Sahara Coal Co., dated November 4, 1944, giving notice of the shipment of cars Nos. 850726, 837033 and 838293 to the pumping station; that 837033 was not delivered; that he was at the pumping station November 10th and 11th and at no time saw the car; that on Monday the 13th, he called plaintiff to inquire about the car and was informed it was on the "rip" track; that customarily coal cars are delivered in the afternoon; that cards identifying cars are removed by his men and checked against the bill of lading; that this procedure was followed with respect to the three cars numbered in the instant bill of lading; that there was no card for No. 837033; that this took place on November 9th; that number 850726 and 838293 are recorded as being received the morning of the 9th, but probably came the afternoon of the 8th; that according to his record, captioned Chlorine Cylinder Record, for November 13, three cars were received at the pumping station - Nos. 827292, 847345 and 825536. He said these cars would have actually been received Friday afternoon November 10th. His daily record for November 10th does not show that any coal was received on that date, and daily records for every day during November show no receipt of Car No. 837033.

This witness identified forms of receipts which he said were customarily executed in duplicate by him pursuant to receipt of bills of lading and deliveries of cars. These were captioned "Freight Bill." He said he had no receipts, however, for cars recorded as received November 9th and 13th.

The only question of fact involved is whether car No. 837033 was delivered to the pumping station. Defendant argues that the trial court was justified in its decision if there was doubt as to where the preponderance of the evidence lay, and that

under Read v. Cummings, 324 Ill. App. 607, the function of this court is not to determine where the preponderance is, but to determine whether the court's finding is against the manifest weight of the evidence. The Read case involved a trial by jury. The instant case does not. In the non-jury cases, though the evidence is in conflict, we may make findings of the fact different from the finding of the trial court. Levinson v. Spector Motor Service, 389 Ill. 466.

Plaintiff argues that its records required by Federal regulations made a prima facie case and that it is inherently improbable that records of three separate employees made at different times, showing car No. 837033 at the pumping station could be falsified. Defendant does not dispute that these records made a prima facie case. Plaintiff insists the prima facie case was not overcome by testimony of defendant's witnesses. It says there is no dispute that cars Nos. 825536 and 827292 were delivered November 10th. It suggests that O'Brien recorded in the November 13th Daily Report the cars then standing on the tracks and that this is consistent with Conductor Stanger's testimony that on November 11th he removed only No. 837033.

We have made a close analysis of the testimony and the exhibits. The Bill of Lading received by O'Brien prior to November 9th covered cars Nos. 850726, 837033 and 838293. The first and third cars appear to have been delivered on the afternoon of November 8th. This appears from O'Brien's Daily Report of November 9th, and McGrath's sampling report of November 10th, of Nos. 825865, 850726 and 838293. The Time of Trip Record of November 10th would indicate that the original consignment of 3 cars noted in the Bill of Lading was broken up since it shows

under Head v. Cummings, 1911 Ill. App. 1, 102, the question of this

court is not to determine whether the evidence is sufficient, but to

determine whether the evidence is sufficient to sustain the verdict.

weight of the evidence, but the court is not to weigh the evidence.

The instant case is not an exception to this rule, though the

evidence is sufficient to sustain the verdict, though the

from the finding of the jury in Head v. Cummings.

See Head v. Cummings, 1911 Ill. App. 1, 102.

It is also to be noted that the evidence is sufficient to sustain the

verdict in Head v. Cummings, 1911 Ill. App. 1, 102.

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It is also to be noted that the evidence is sufficient to sustain the

delivery of No. 837033, not with No. 850726 and 838293 its consignment companions, but with Nos. 825536 and 827292. These latter two are included in O'Brien's November 13th report as cars having been received November 10th. They were sampled by McGrath according to his report on November 13th which was his next day's work after November 10th.

The November 10th Time of Trip Record does not show delivery of car No. 847345. This car, however, is included in O'Brien's November 13th receipts and in McGrath's November 13th samples. It also appears in plaintiff's Checker's Report of November 11th. Finally, No. 837033 appears in the latter report and in the November 10th Time of Trip Record, but not in O'Brien's or McGrath's record of November 13th.

It seems clear that No. 837033 was taken from its companion cars in the consignment and was on the repair track on the afternoon of November 8th when the other two cars were delivered to the pumping station. This is borne out by the Daily Report of November 9th by O'Brien and the sampling record of McGrath of November 10th. It is consistent with plaintiff's Car Inspector's testimony, its exhibits 1 and 2 and consistent with O'Brien's testimony. It would likewise seem that No. 837033 was removed from the repair track and delivered with other cars at the pumping station November 10th after McGrath left work at 3:30 P.M. An inference to that effect requires disregarding testimony of plaintiff's witness Lau that No. 837033 was on the track at 7:30 A. M. November 10th and would, likewise, attribute an oversight to O'Brien when he looked for the missing car November 10th and 11th. It is true that O'Brien testified that he called plaintiff

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the morning of November 13th about the car and was informed it was on the repair track. This is consistent with plaintiff's testimony and Stanger's record that the car was removed from the pumping station and returned to the repair track on November 11th. This return to the repair track, likewise, could explain the red X's if they were not mere identification marks made in preparation of trial. The record on which the red X appears carried an instruction to plaintiff's employees to mark with an X any car in "bad order".

O'Brien worked from 8 A. M. to 4:30 P.M., November 10th and from 8:30 A. M. until noon November 11th. This fact would make it possible for the three cars delivered November 10th to have been delivered after McGrath left at 3:30 P.M. Had they come before McGrath left, he probably would have taken samples of them. Stanger said he removed car No. 837033 early in the afternoon of November 11th. This would be after O'Brien had quit at noon.

The missing link in this reconstruction of the transaction is the lack of any record in exhibits introduced by plaintiff of delivery of car No. 847345. Defendant might well contend that plaintiff delivered car No. 847345, recording it as No. 837033. This would require disregarding the record of Lau, which includes 847345 and 837033 in his list of cars at the pumping station on November 11th.

We believe that our conclusion that the car was delivered, is more reasonable on the record before us. We must say that it is difficult to understand why receipts are not insisted upon in transactions of this kind. A receipt here would have saved much time and expense.

For the reasons given the judgment of the Municipal Court is reversed. The cause is remanded with directions to proceed in a manner not inconsistent with this opinion.

REVERSED AND REMANDED
WITH DIRECTIONS.

LEWE, P.J. AND BURKE, J. CONCUR.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

General No. 9544

Agenda No. 7

William E. Fliege, Administrator of
the Estate of William E. Fliege, Jr.,
deceased,

Plaintiff-Appellant,

vs.

Henry A. Gardner, Trustee in Bankruptcy
of the Alton Railroad Company,
Defendant-Appellee.

Appeal from

Circuit Court of

Sangamon County

3321A. 583²

Wheat, P. J.

Plaintiff-Appellant William E. Fliege, administrator of the estate of William E. Fliege, Jr., deceased, instituted this suit for damages for the wrongful death of his intestate. On trial by jury, the court directed a verdict for defendants at the conclusion of plaintiff's case, and from the judgment entered on such ruling, this appeal follows.

The complaint charged that on June 16, 1944, Eighth Street extended north and south in the City of Springfield, Illinois; that Eastman Avenue, extending east and west, intersected said Eighth Street; that at such intersection, defendant railroad maintained two parallel tracks about eight feet apart, which crossed said street intersection diagonally, extending north-easterly and southwesterly; that on such date about 5:50 P.M. (C.S.T.) defendants operated a freight train southwesterly on the northerly track, and also a passenger train known as the Ann Rutledge, northeasterly on the

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southern track, both trains at the same time crossing the said street intersection; that the freight train completely obscured the view of the passenger train to pedestrians approaching the crossing from the north; that plaintiff's intestate, of the age of nine years, was proceeding south on Eighth Street toward such crossing, in the exercise of due care for his own safety; that when the south-bound freight train cleared the crossing of the tracks with the highways, such boy proceeded to cross such tracks and highways at the intersection, and was struck and killed by the north-bound passenger train.

As to the alleged negligence of defendants, paragraph 12 of the complaint charged general negligence in the maintenance and operation of the railroad crossing and the trains. Paragraph 13 charged violation of Sec. 59, Chap. 114, Illinois Revised Statutes, in that no bell or whistle was rung or whistled on the passenger train at a distance of 80 rods from such crossing and kept ringing or whistling until the crossing was reached. Paragraph 14 charged that it was the duty of defendants to then and there operate its trains, when moving in opposite directions, at no greater speed than was reasonable for pedestrians entitled to use the same; that defendants operated such passenger train at an unreasonable and dangerous speed, to wit: 70 miles per hour. Paragraph 15 charged that because of the double tracks crossing the street diagonally, the obstruction of view by the trains meeting, and because of the large

number of persons and vehicles using the intersection, the crossing was an unusually dangerous one, which was known to defendants; that defendants insufficiently guarded and protected the crossing at a time when such trains were passing, the passenger train going at a dangerous rate of speed, to wit: 70 miles per hour. The answer denied the material allegations of the complaint.

The defendants named were The Alton Railroad Company, a corporation, and Henry A. Gardner, Trustee in Bankruptcy of The Alton Railroad Company. The former filed a motion to dismiss as to it by reason of the bankruptcy proceedings, but no disposition of such motion is shown by the record.

The evidence established the physical situation as to the tracks and streets as set forth in the complaint, and it was stipulated that the boy was struck and killed by the passenger train. No witness saw the boy in the vicinity of the crossing before or at the time he was struck, although two occupants of an automobile saw an object fly through the air as the caboose of the freight train cleared the crossing and the engine of the passenger train entered the crossing.

The witness, Bryan Nolting, a police officer, was proceeding north on Eighth Street. It does not appear whether he was in an automobile or walking, although he said he was "headed" north, nor does it appear at what distance he was from the crossing when he stopped for a freight train going northeasterly on the south track. He did not see the boy before or when he was struck, but someone informed him and he reported to the station; the boy was found "north of the tracks" 80 feet from "where he was hit"; he did not know

whether the passenger train whistled or not. He was not asked whether or not the bell was ringing or as to the speed of the train.

Francis Scott, a police officer, testified that he went to the crossing in response to a call; that the boy was lying 80½ feet east of Eighth Street north of the tracks.

Elizabeth Fliege, the boy's mother, stated that the family had lived about a block north of the crossing on the west side of Eighth Street for the past four years; that during such time the boy crossed the tracks going to and from the store and school; that she had many times walked across the tracks with the boy; that on some of those occasions she had seen the crossing lights flashing when no train was in view; that a switch engine would sometimes be down at the Sangamon warehouse; that on the day of the accident, the boy was going to his cousins' home and had to cross the tracks; that he had crossed the tracks many times in the four year period; that the Ann Rutledge train was operated with a diesel engine. She stated that she last saw the boy going down the steps of their house, but did not fix the time as to the hour or as to whether it was in the morning or afternoon.

Peter Bartole testified that he had lived 275 feet from the crossing for 25 years, was familiar with it and had crossed it many times; that east of Eighth Street the railroad had a switch track leading to the Sangamon warehouse; that the crossing flashing lights sometimes flashed for 15 to 20 minutes or more at times when no train was visible from the crossing.

The witness Marguerite Finnegan testified that on the day in question she was driving a car headed south on Eighth Street and had stopped the car about 100 to 150 feet north of the crossing waiting for the south-bound freight train to pass; that her father (deceased at time of trial) was in the front seat with her, and her sister Mary was in the rear seat; that she heard the usual noise of a freight train but did not hear the passenger train approaching; she first knew of the passenger train as the last of the freight train had passed; she had no knowledge as to the speed of the passenger train; she did not see any boy; she saw "something going through the air - something being thrown in the air" in front of the passenger train; she heard no whistle or bell on the passenger train as it approached; she did not know where the boy landed as she drove on when the crossing was clear. On cross examination, she said that she and her sister, in the rear seat, were talking back and forth; she wasn't looking for the passenger train and wasn't paying any particular attention.

Mary Finnegan, the sister, who was in the rear seat of the car, said she heard the noise of the freight train; it had just passed the west side of Eighth Street when she first saw the engine of the passenger train; she never saw a boy at all; when the train was about even with the automobile she saw an object fly through the air; they did not investigate because of her father's age and condition, but drove on; she did not know the passenger train was coming and heard no whistle blow or bell rung. On cross examination, she stated that she and her sister had been visiting and talking; the

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freight train was making the usual freight train noise; she didn't see the boy as she was looking to the left for the end of the freight train; she wasn't paying any attention as to whether or not a passenger train was coming; if it sounded a horn, she didn't hear it.

William Fliege, the boy's father, a locomotive fireman and engineer for another railroad, testified that he did not see the accident; flasher lights were located at the crossing; a switch track led to the Sangamon Electric Warehouse and was about 180 feet northeast of the crossing; at this point there were also cross-over switches to enable a train to cross from one main track to the other; farther north there were other switching facilities; because of his experience of 20 years with railroads, he was familiar with switches and the effect they have on the operation of flasher signals; when a train is in the electrical circuit, the flashers operate; when a switch engine is being used on the various switch tracks, the lights operate even though no train is upon the main tracks, nor visible to travelers at the crossing; he had been crossing these tracks twice a day; many times the lights had flashed from fifteen minutes to the biggest part of an hour and no train would be visible from the crossing; on some of these occasions, the boy was with him, afoot or in a car. He said it was approximately $1\frac{1}{2}$ miles to $1\frac{3}{4}$ miles from the Alton station in Springfield to the place of the accident.

The above constitutes all of the material testimony. Certain exhibits were admitted in evidence, consisting of photographs of the crossing and portions of a timetable issued

by the railroad. The latter indicated a speed limit between Laurel Avenue and North Grand Avenue of 25 miles per hour, but nowhere appears the relative location of the accident scene with either of these streets; the timetable also set forth General Order No. 138 of the Illinois Commerce Commission, which requires a train, when passing or meeting or about to pass or meet another train in the vicinity of a grade crossing under such circumstances that the second train will obscure in whole or in part the view of the first mentioned train, to give warning by prolonged or repeated whistling; the exhibit further showed that the Ann Rutledge train had a schedule of 8 minutes from Springfield to Sherman, a distance of $7\frac{1}{2}$ miles.

It was stipulated that the passenger train left the Springfield station at 6:24 P.M. and that it was reported by the engineer that the accident happened at 6:27 P.M., with the further understanding that the defendants might show or explain how it arrived at the 6:27 figure.

Of the three occurrence witnesses, Bryan Nolting, Marguerite Finnegan and Mary Finnegan, none saw the boy at any time before or at the instant of the impact. As to the issue of warning, the witness Nolting, who was near the crossing, merely said that he didn't know whether the passenger train whistled or not, and he was not questioned as to whether a bell was ringing or not. It does not appear how near or how far the witness was from the tracks, his attitude of attention, or other circumstances tending to show that he would have heard a warning had one been given. His testimony was thus of little value. In the case of Berg v. ^{New York Central} N.Y.C. & N.H. R.R. Co., 391 Ill. 52, a witness Fancher testified that he crossed railroad tracks a



block from an accident scene, and did not hear the sound of a whistle. As to his testimony, the Court said: "The only question is as to whether the negative testimony of plaintiff's witnesses may be considered as proving or tending to prove that no warning was given of the approach of the train by the sounding of a bell or whistle. It is well settled that negative evidence is admissible where the attending circumstances are such as to show that it has some probative force. (Cases cited). It is obvious that if a witness, without explanation of his evidence, testifies that he did not hear a bell or whistle, such testimony would have no value. To give it probative force, it must appear that the witness was in such proximity that he could have heard the sound had it been given, and that his attitude of attention was such that if the bell or whistle had sounded it would have attracted his attention. The evidence of the witness Fancher on the sounding of the whistle is of no value."

The witnesses Marguerite Finnegan and Mary Finnegan both positively testified that they did not hear a whistle or bell sounded. Under the foregoing rule, their testimony was of some value on the question of warning and it was for the jury to determine what weight should be given to such testimony.

As to the charge in the complaint that the passenger train was going at an unreasonable and dangerous rate of speed considering surrounding circumstances and conditions, the witnesses Nolting and Mary Finnegan were not asked about this, and Marguerite Finnegan stated that she had no knowledge. Plaintiff argues that the timetable issued by the railroad indicates a speed of 25 miles per hour between Laurel Street and North Grand Avenue, but as heretofore noted, no evidence indicates the relative location of the accident scene with

either of these streets. As to the evidentiary value of the timetable indicating a schedule of 8 minutes for traveling the distance of 7 1/2 miles between Springfield and Sherman, this was of some value to prove the speed of the train, and especially so when considered in connection with the stipulation to the effect that the train left the station at 6:24 P.M. and that it was reported by the engineer that the accident happened at 6:27 P.M.. The testimony of the witness Flicke, the boy's father, was that it was approximately 1 1/2 to 1 3/4 miles from the station at Springfield to the scene of the accident. The rate of speed thus became a matter of computation, and its evidential value a matter for the jury.

The rule applicable in passing upon a motion for directed verdict is that the evidence must be considered in its aspects most favorable to the plaintiff, together with all reasonable inferences to be drawn therefrom, and the court is required to assume that such evidence is true. The evidence must not be weighed and all contradictory or explanatory circumstances must be rejected. The only inquiry is as to whether there is any evidence fairly tending to prove the complaint. (Berg v. New York Central R. Co., 323 Ill. App. 221). Measured by this rule, it is our opinion that there was some evidence as to negligence on the part of defendants as to lack of warning and as to speed of the train which would warrant the submission of this case to the jury.

The defendant has argued that the evidence shows that the proximate cause of the accident was the conduct and

actions of the intestate rather than any negligence on the part of the railroad. In the state of the record, this can not be said to be true for the reason that such conduct and actions of the boy, at and just prior to the accident, are not shown, no eye-witness having testified to the same. The point is not made nor argued that there was any duty on the part of the plaintiff to so show such actions and conduct and therefore there is no occasion for the court to consider such question.

For the reasons stated, the Court is of the opinion that the Circuit Court of Sangamon County erred in granting the motion for a directed verdict and entering judgment thereon. The judgment of the trial court is therefore reversed and the cause remanded for a new trial.

Reversed and remanded.

Gen. No. 10694

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
Abstract
OCTOBER TERM, A. D. 1946

SKANDIA COAL AND LUMBER
COMPANY, a corporation,

Plaintiff-Appellee,

vs

ROCKFORD METAL PRODUCTS
COMPANY, a corporation,

Defendant-Appellant.

332 I.A. 384

Appeal from the
Circuit Court of
Winnebago County

Bristow, J.

This appeal comes to this court from the Circuit Court of Winnebago County, wherein there was a judgment entered in favor of the appellee and against the appellant in the sum of one thousand dollars after a non-jury hearing.

The Skandia Coal and Lumber Company filed their complaint alleging that the Rockford Metal Products Company, a corporation, was indebted to them on March 1, 1933 in the sum of \$1,625.15, and on that date there was executed a note in that sum, signed by A. M. Anderson, the president of the Rockford Metal Speciality Company, which was the name of the present defendant corporation at that time. This note was payable January 1, 1938.

Some time during the year 1936, the financial status of the defendant company became weak and precarious, whereupon, the appellee, along with the other creditors, was asked to surrender its notes or evidences of obligations, and to take in lieu thereof a promise in writing as follows: "September 9, 1936 Skandia Coal & Lumber Co. Rockford, Illinois Attention Mr. Hultberg Gentlemen: You will recall that some time ago we discussed a note given to you by our

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company for \$1625.15 as of March 1st, 1933. We asked and you agreed that at our request you would cancel and surrender this note, placing the obligation on a moral basis to be paid when our financial structure had been built up so that we were able to do so. This agreement has now been entered into by all concerned, and we would ask that you return this note. You may rest assured that this company fully intends to meet this moral obligation as soon as it possibly can. Thanking you in advance for your prompt cooperation and assuring you that we will reciprocate to our utmost we are Yours very truly, Rockford Metal Specialty Co. A.M.Anderson: HS
By A.M.Anderson President."

The complaint filed in this case further charged that the appellee in pursuance to this letter did surrender its note, and that the appellant continued in business and thereafter enjoyed a measure of prosperity; that on May 28, 1945, the appellee and appellant made a compromise settlement of the foregoing obligation for the sum of \$1000. To this complaint there was filed a motion to strike which was overruled by the court, and in the answer to the complaint, the appellant again asserted that there was a lack of consideration for the compromise agreement, and that, consequently, it was not enforceable. It was further denied therein that such a compromise settlement was made, and that if it was made, the agent making, was without authority to do so. Subsequently, the answer was amended to set forth the defense of the statute of limitations.

On May 23, 1945, Henry T. Hultberg, president of appellee company, and Stuart Mattoon, accountant and credit manager of the same company, called on Wayne H. Diehl, secretary of appellant company. They discussed with him the matter of settling the obligations created in the letter of September 9, 1936. They both testified that Diehl agreed to pay \$1000 in full settlement of the account, and that Diehl said "that he liked to do business that way." Diehl said that he did not remember such conversation. A reading of the record in-

dicates that Diehl was not a very convincing witness. His testimony was replete with evasions, contradictions, and "don't remembers."

It is argued here that Diehl had no authority to make any agreement. Diehl was a member of the firm of accountants entitled "Gauger and Diehl." This firm had charge of the general management of the defendant company, and Diehl was the local representative of the firm and actually did the work as general manager. The evidence further shows that Diehl was the owner of a majority of the outstanding stock of the appellant company; and that the other members of the Board of Directors of this company were busily engaged in other activities and spent very little time in the conduct of appellant's business. The evidence further shows that there was no other person connected with appellant corporation except Diehl to whom appellees could have gone to settle this matter. Diehl said to them that he had the authority to settle this claim. He was the only one that appeared in the courtroom on the trial of this cause. Certainly, the trial court was correct in holding that Diehl, the secretary-treasurer, and only active manager of the company, had the authority to bind the company in the settlement of a twenty-five hundred dollar account that he knew his company owed for one-thousand dollars.

The trial court in his written opinion stated that the proof clearly showed the compromised agreement as claimed by the appellee. We are convinced that the record justifies such a finding. The trial court further expressed the opinion that the letter of September 9th did not purport to fully cancel the obligation owing from the appellant to appellee, but simply surrendered the note representing the indebtedness. Be that as it may, the letter certainly indicates that appellant agreed to pay any existing indebtedness when and if it became financially recovered. There was evidence that appellant was prospering, and that they had reached such a state of business recovery that they should recognize their obligation to pay.

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We believe, further, that the argument made by appellee that the original debt of 1933 was never cancelled since any agreement to do so, if there was one, lacked consideration. We are of the view that there was sufficient consideration for the oral promise to pay \$1000.00 sued upon in the instant case. Even should we interpret the relationship between the parties hereto in the same light as urged by appellant, we are of the opinion that the law in this state would sustain a recovery. Any moral obligation which was once a legal obligation has been held to be a good and sufficient consideration. Schwerdt vs Schwerdt, 235 Ill. 386. In the case of Hulse v. Hulse, 155 Ill. App. 343, at page 349, the court had this to say: "These authorities proceed upon the principle that the law permits a man to pay an honest debt no matter how barred, or to right any wrong or grievance that another may have suffered by his conduct, without litigation; and that 'when he constitutes himself a judge in his own cause and decides against himself,' by making a new contract 'he cannot be heard to reverse his own judgment.' "

The judgment of the trial court should be affirmed.

JUDGMENT AFFIRMED.

Abstract

in. no. 1063

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY ~~OCTOBER~~ TERM, A. D. 1947

7527

In the Matter of the Estate of)
MARTHA HILDEBRAND, deceased.)

Appeal from Circuit Court
Ogle County, Illinois

332 I.A. 584²

Bristow, J.

This case is lodged in this court as a result of an appeal from the Circuit Court of Ogle County wherein certain objections were overruled to a final report filed by Frank Hildebrand, Administrator. Martha Hildebrand died testate many years ago, leaving surviving, Frederick Hildebrand who was appointed executor under her will. He was given a life estate in her real estate with remainder to certain heirs and devisees, and the nieces and nephews should share the residue.

Frederick Hildebrand, who lived to be an old man of the age of ninety-five years, lived in the village of Monroe Center, Illinois. He was usually called "Uncle Fred." He had a nephew, Frank Hildebrand, who assisted him in all his business affairs, and during his later years took care of his person. Frank was an officer in the Monroe Center State Bank, and, as such and while he was acting as an adviser to Uncle Fred, on October 10, 1931, caused to be transferred from the bank to the estate of Martha Hildebrand unsecured notes in the sum of seventeen thousand dollars (\$17,000). It seems that the bank had previously received a notification from the Banking Department of the State of Illinois that many of the above notes were of doubtful value. It was just a short period before the bank was closed and a receiver was appointed. Just prior to the

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death of Uncle Fred, Frank had himself appointed conservator of his estate, and had allowed and was paid a claim for services for taking care of the person of Uncle Fred from February, 1929 to February, 1932. Upon the death of Frederick Hildebrank, Frank had himself appointed administrator de bonis non with will annexed, of the estate of Martha Hildebrank. He also was appointed as executor of the estate of Frederick Hildebrank. No current accounts were filed by him for a long period of time, so the heirs and devisees of Martha Hildebrand filed a suit for an accounting. This suit resulted in a decree holding the estate of Frederick Hildebrand responsible for the loss arising from the non payment of the notes transferred from the bank to the Martha Hildebrand estate, and granting other relief not important to this opinion.

One of the contentions made by appellants in the County and Circuit Court was that Frank Hildebrand, acting in a dual capacity, namely, for the bank and his Uncle Fred, committed fraud in selling his Aunt Martha's estate worthless securities, and that, he, having failed to take steps to collect for such fraud, should be surcharged for the loss sustained. Two other objections were urged by the appellants to the approval of the final account of Frank Hildebrand, namely, that the administrator de bonis non appropriated certain real estate which had been pledged as security for a note instead of obtaining the cash in payment for such note; and, thirdly, that the court erred in allowing fees to the administrator de bonis non.

In both the County and Circuit Courts adverse results were obtained by the appellants. Complaint is made that the trial judge refused to receive testimony upon the issue that Frank Hildebrand was guilty of fraudulent misconduct.

One of the earliest cases dealing with the duty of an administrator de bonis non in connection with a loss arising out of the misconduct of a deceased personal representative as it existed under the Common Law is Rowan vs Kirkpatrick et al, 14 Ill. 1,

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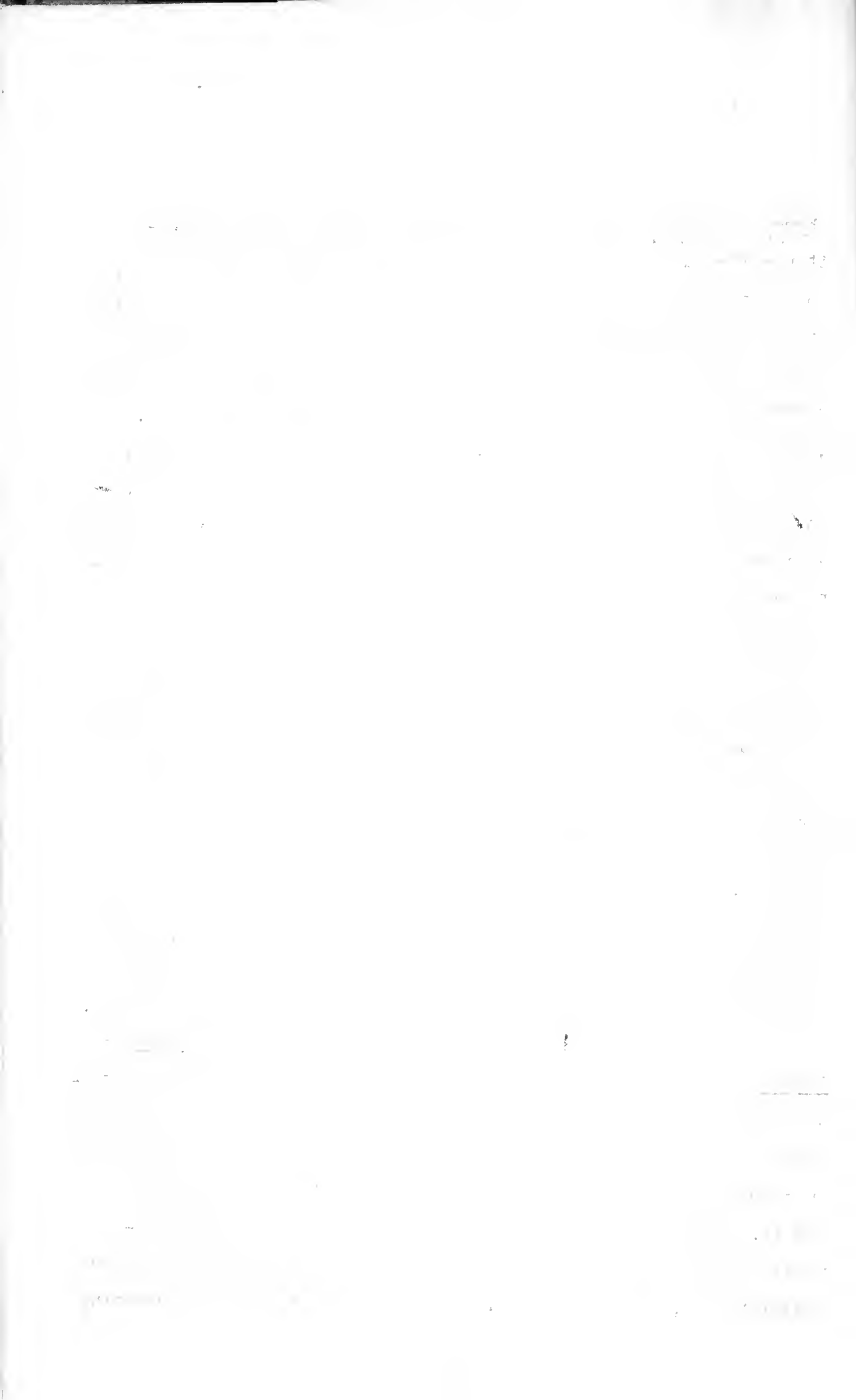
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where the court said: "It was insisted, on the argument, that it was the duty of Rowan, as administrator de bonis non of James, to collect from the estate of Alexander all claims which the heirs of James might have upon it; and that the heirs could not maintain a suit against the administrator of Alexander Reid, for assets converted by him in the administration of their ancestor's estate. Directly the reverse is the law. The heirs or distributees can, and the administrator de bonis non cannot, maintain such a suit. * And an administrator de bonis non has no authority to call on the first administrator, or in case of his decease, on his personal representative, for an account of assets already administered upon. His commission only authorizes him to administer upon so much of the estate as was unadministered upon by the former administrator. Whatever goods and chattels of the first estate remained in specie, or can be traced and distinguished from the estate of the first administrator, the administrator de bonis non has the right to recover; but he has no right, as a general principle, to call the representative of the deceased administrator to account for any part of the estate sold, converted or wasted by him. When an administrator converts the goods of his intestate to his own use, it is an administration of such goods, and being an administration, is consequently without the commission of an administrator de bonis non."

At page 338 of the same volume in the case of Newhall vs Turney appears the following language: "The powers of an administrator de bonis non are well established. He is entitled to recover such of the goods and chattels of the intestate, as remain unadministered in specie; and such of the debts due to the intestate as remain unpaid. But his authority does not extend to assets already administered. So far as the estate has been administered by the first administrator, he is concluded." It would appear from the foregoing



that the administrator de bonis non had no authority to bring actions for wrongs committed by a prior administration. In Chapter 3, Sec. 37, Smith-Hurd Revised Statutes for 1935 appears the following: "When a sole or surviving executor or administrator dies without having fully administered the estate, if there is personal property not administered, or are debts due from the estate, or is anything remaining to be performed in the execution of the will, the County Court shall grant letters of administration with the will annexed or otherwise as the case may require, to some suitable person, to administer the estate of the deceased not already administered, and the securities on the bond of such deceased administrator shall be liable on the same to such subsequent administrator or to any other person aggrieved for any mismanagement of the estate committed to his care, and such subsequent administrator may have and maintain all necessary and proper actions against the securities of such former executor or administrator for all such goods, chattels, debts and credits as shall have come to his possession and are withheld or may have been wasted, embezzled, or misapplied and no satisfaction made for same." No where in this section does it appear that the administrator de bonis non had authority to sue anyone but a bondsman of the deceased personal representative.

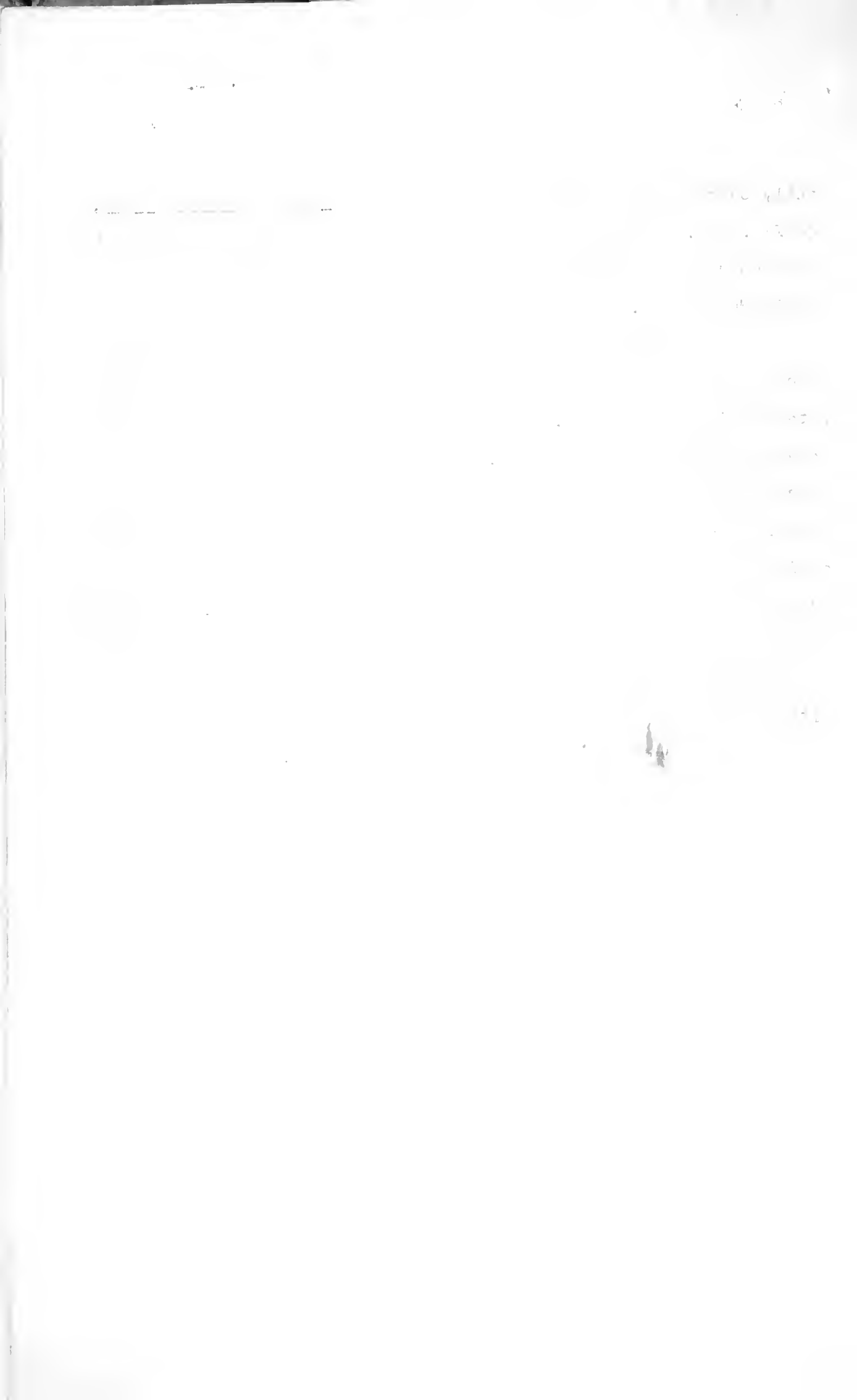
In the suit heretofore referred to wherein the heirs of Martha Hildebrand sought an accounting, Frank Hildebrand personally and in his representative capacity was made a defendant. In that proceeding the court examined his accounts and directed his future action with reference thereto. The final account of the appellee is a report in effect of his compliance with that decree. Whether or not Frank Hildebrand was guilty of any fraud in connection with the estate of Martha Hildebrand was not considered, but it was one that very well could have been properly adjudicated, and, since there was a failure to do so, it is our opinion that they are pre-

sently barred from doing so in this action. Litch vs Clinch et al, 136 Ill. 410. In view of the foregoing, we are of the view that the lower court was correct in sustaining the first objection made to appellee's account.

The second objection relates to the administrator taking some real estate which constituted the only security for a certain note owned by the estate. It appears that the real estate was the only asset owned by the debtor. Appellants argue, however, that since the administrator had not previously obtained the approval of the probate court, his action cannot have the approval of the court on final accounting. It being undisputed that the administrator acquired the only property of the debtor without expense, his action in so doing is not open to criticism. The third objection that the administrator de bonis non should not be allowed fees is also without merit.

Judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.



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In The
APPELLATE COURT OF ILLINOIS
Second District

May Term A.M. 1947

MARY HESTON.

Plaintiff-Appellant,

VS.

JEFFERSON BUILDING CORPORA-
TION, a Corporation,

Defendant-Appellee.

Appeal from the
Circuit Court of
Peoria County

Honorable Henry J. Ingram
Judge Presiding

Judge Presiding
332 L.A. 385

Bristow, J.-- This case comes here from the circuit court of Peoria County where judgment notwithstanding the verdict was entered for the defendant-appellee.

On November 30, 1945 Mary Heston was injured while in the ladies' room of the Jefferson Building at 200-206 South Jefferson Street, Peoria, which was a building owned, controlled and maintained by the defendant, the Jefferson Building Corporation.

The plaintiff brought suit in the circuit court of Peoria County where she recovered a verdict in the sum of \$3000, after which the defendant filed a motion for judgment notwithstanding the verdict which was allowed. From this judgment an appeal has been prosecuted to this court.

The plaintiff entered the building in question about 1 P.M. and then went to the ladies' rest room on the ninth floor. The fact that the plaintiff accidentally fell and injured herself, and the fact that the defendant controlled and maintained the premises when the accident occurred is uncontroverted.

The plaintiff upon entering the rest room walked across to the opposite end where the floor level steps up about six inches, and where the toilets are situated. She remained there about five minutes, and, upon leaving, fell upon the floor at the point of the six inch step-off. There were no signs or lights at the base of the step-off. That the plaintiff was seriously injured and such injuries were the result of the accident is not seriously questioned by appellee in their brief.

The ruling of the lower court in this case is defended by appellee on the grounds that there was no proof of negligence on the part of defendant and that

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plaintiff was guilty of contributory negligence as a matter of law.

The evidence without any dispute indicates that the ladies' rest room under consideration was well kept, clean and well lighted. The floor of the room when you first enter is solid black, and the floor of the upper level where the toilets are located is white marble. The color contrast thus makes the place of change in level readily discernible. There were large frosted glass windows in the south end of the room, and witnesses said the light coming through the windows was brighter than the artificial lighting. One of the witnesses, Emma Leary, testifying for plaintiff said:

"It was shortly before one o'clock. The room was well lighted, there was light coming in through the windows. It wasn't raining out. . . . The step is about six inches high and six feet long. The floor as you enter is black, by the washstands it is white marble. The lighting that comes through the windows at that time of day is brighter than the lights in the ceiling if it is a bright sunny day. . . ."

The proof further indicated that girls were smoking in the rest room which made the atmosphere slightly foggy; and that there were possibly some shadows that might obscure one's vision slightly. There were no obstructions of whatever kind at the point of the accident. The two photographs admitted in evidence upon the trial show conclusively that the rest room was clean and smooth, and that there was marked contrast between the black color of the linoleum on the lounging room floor and the white of the marble in the riser to the toilet level. To hold that the defendant was guilty of any actionable negligence in the manner in which the rest room in question was constructed and maintained would be tantamount to holding that every defendant in a case of this character is an absolute guarantor of the safety of everyone using their premises.

Structurally, the rooms in question were without fault. The step where plaintiff fell was neither too high nor too low. It was visible to her when she entered the toilet room, and the evidence does not disclose any reason why plaintiff did not see the step when she came out five minutes afterwards. Certainly the plaintiff was guilty of contributory negligence as a matter of law. We deem it unnecessary to consider the many cases cited in appellant's brief, for in each of them there were disputed questions of fact, and, consequently, factual issues for the jury to consider.

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We are of the opinion, therefore, that the trial court acted properly in holding that the plaintiff failed to prove the facts necessary to her right of recovery and in entering judgment for the defendant.

JUDGMENT AFFIRMED.

We are of the opinion, therefore, that the trial court was correctly in holding that the plaintiff failed to prove that the recovery and in entering its award for the plaintiff.

THE COURT THEREUPON

332 I.A. 652

43766

ROSE ANN KLOOSTER,
Appellee,

v.

THOMAS J. FRIEL and CHARLES
C. RENSHAW, as Trustees, etc.,
et al., doing business as
CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

305

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In a suit to recover damages for injuries sustained by plaintiff when she was struck by a southbound State street car at or near the intersection of Delaware place in Chicago, defendants' motion for a directed verdict at the close of all the evidence was denied, and the jury returned a verdict for plaintiff in the sum of \$30,000. After subsequent motions for judgment notwithstanding the verdict, and in the alternative for a new trial, were likewise overruled, the court entered judgment on the verdict, from which defendants appeal.

The question of defendants' liability is the paramount issue. The accident occurred at about 9:45 p.m. on Sunday, September 17, 1944. The intersection of State street and Delaware place was well lighted, the weather was clear and dry, and the headlight and inside lights of the street car were burning. Plaintiff was about 19 years of age at the time of the accident and was employed as a nurse's aid at Wesley Memorial Hospital in Chicago. She resided at 51 West Delaware place and was familiar with the intersection, having boarded street cars at that corner whenever she went downtown.

Defendants do not contend that the verdict was against the manifest weight of the evidence, but it is their sole contention "that if the accident happened in the manner and in the circumstances testified to by plaintiff, there is no liability as a matter of law or as a matter of fact," and their counsel say

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ROBT. W. ROY

THOMAS L. ROY

1911

THOMAS L. ROY
C. O. ROY
et al.,
Plaintiffs
vs.
ROBT. W. ROY
Defendant

THE COURT, after reading the petition and the answer thereto, and the evidence introduced by the parties, is of the opinion that the petition is not sustained. The defendant is not liable for the damages claimed by the plaintiff. The plaintiff's claim is not supported by the evidence. The defendant is entitled to a judgment in his favor. The plaintiff's claim is dismissed. The defendant is awarded costs. The judgment is entered accordingly.

that in the discussion of this contention they are satisfied to confine themselves to the testimony of plaintiff and her witness and to such testimony of other witnesses as is not contradicted. Accordingly, we shall limit our discussion of the question of liability primarily to the circumstances testified to by plaintiff.

After visiting a friend on the northwest side on the evening in question, she took a Milwaukee-avenue car downtown and from there proceeded home on a northbound State-street car. At Chicago avenue she left her seat and went to the front platform to alight at Delaware place. When the car stopped at the intersection, she stepped off at the south crosswalk, walked back toward the curb, and waited there until the street car and an automobile passed to the north. She then looked in both directions for traffic and started to cross the street on the south crosswalk. When she first noticed the southbound street car it was about one-third of a block away, to the north of Delaware place, coming, as she judged, at about 25 to 30 miles an hour. She continued to look in a northerly direction and did not notice any change in the speed of the car as it came across the intersection. She testified that about the time she first saw the southbound car she observed an automobile coming from the west on Delaware place, and as she walked toward the west across the tracks the automobile took a turn to the south on State street. She had almost cleared the southbound track when the automobile turned quite close to and in front of her. She was then on the west rail of said track, but had to stop because the automobile blocked her path, and she was standing there when the street car struck her. "I did not move backwards at any time. * * * When I made my stop, I noticed where the street car that was coming south was at that time. I was

watching it all the time. It was just approaching the north curb line. It kept on coming from that time until the accident. * * * That automobile was past me when the street car came up and hit me. * * * The automobile just passed me when the accident occurred. I couldn't say how far past it got. * * * I was standing on the last rail and at the instant the car passed me, the street car struck me."

The only other one of plaintiff's witnesses whose testimony has any bearing upon the accident is James McNeff, who was standing on the northwest corner of State street and Delaware place in front of his tavern. He was facing southeast, and stated that when he first saw plaintiff she was standing on the outside or west rail of the street-car tracks, on the south crosswalk; that he saw the street car and the automobile making a right turn off of Delaware; that at the moment he noticed it, the street car was just about opposite his tavern, going south at approximately 25 miles an hour; that before the accident occurred he saw the automobile only from the rear as it was going south; that it had about completed its turn and was then facing south when plaintiff was struck; that in about the center of the intersection the motorman applied the brakes on the street car, but he did not think that there had been any change in its speed before it struck plaintiff; that the rear end of the street car stopped about 5 feet south of the crosswalk; and that plaintiff had been pushed, shoved or rolled by the impact and was lying underneath the west side of the street car, alongside the rail, behind the front trucks, approximately 25 feet south of the crosswalk.

The gravamen of defendants' argument is that "If, from the time plaintiff started to cross the tracks up to the time she reached the west rail, the circumstances were such as to

justify her, in the exercise of ordinary care, in believing that she could cross the tracks ahead of the approaching street car in safety, then there would be no basis in law, reason or justice for holding that, in the same circumstances, the motorman was guilty of negligence in also believing that she could cross the tracks ahead of the approaching street car in safety. If there is any reasonable basis in the facts and circumstances as testified to by plaintiff for holding that the motorman was negligent in failing to see danger before plaintiff stopped on the west rail and in failing to attempt to stop the street car before plaintiff stopped on the west rail, then, to be consistent, plaintiff must also be charged with a want of due care for also failing to see such danger and without making any effort to avoid it." (Italics defendants.) In other words, it is urged that the motorman should not be held negligent in assuming that plaintiff could cross the tracks in safety in front of the approaching car. The fallacy of this argument is that the motorman never claimed that he saw plaintiff crossing so far ahead of his street car that she was apparently going to get out of his way. He testified that plaintiff tried to cross the tracks behind the car from which she had alighted; that she was walking briskly across the tracks south of the intersection; that he did not see her until he was some 15 or 20 feet from her; that he then sounded his gong and applied the emergency brakes, but could not bring his car to a stop before it struck plaintiff. The jury evidently rejected his testimony and accepted plaintiff's version of the accident. If plaintiff's testimony is taken as true, the motorman had a clear vision of the track and could have seen plaintiff when his car was about 150 feet away from her. Thereafter he had no right to assume that she could safely get out of his path. He was passing over a busy crossing and owed plaintiff the duty of exercising care commensurate with the circumstances. If the

automobile going east on Delaware place served as a warning of danger, he should have heeded the warning; but he said he did not see the automobile, although plaintiff and McNeff both described its approach toward the east and its turn south on State street. The law is too well settled as to the rule that a witness will not be heard to say he did not see that which is plainly discernible, to require the citation of authority. Under the facts testified to by plaintiff and her witness McNeff, the jury were justified in finding that the motorman was negligent in failing to keep a proper lookout and in running his street car across a busy intersection at what seems to be a high rate of speed under the circumstances.

As to plaintiff's conduct, it is urged that when she found herself trapped by the automobile which crossed in her path before she could clear the last rail of the southbound tracks, she could or should, in the exercise of due care and caution for her own safety, have taken several steps backward and avoided the accident, and that being a young girl in good health and athletically inclined, she "was entirely capable of making an effort to get off of the track and out of danger while the street car was coming clear across the street." It is evident, however, that plaintiff was suddenly confronted by a danger she did not and could not anticipate. The automobile which turned south on State street cut off her path so that she could not proceed across the last rail, and as she saw the approaching southbound street car it was incumbent upon her to make an instantaneous decision. In that moment she was required to decide whether the automobile passing in front of her would give her time to make another step forward to safety, or whether it would be safer to take several steps backward and avoid the rapidly approaching street car from the north. She was caught in a position of

danger, and the situation necessitated an immediate decision. The law did not require her to weigh nicely the chance of stepping forward to safety against the possibility of moving backward out of the path of the street car. Under the circumstances her decision to step forward was reasonable, and in any event the evaluation of her conduct in the emergency was for the jury. Stack v. East St. Louis Ry. Co., 245 Ill. 308; Barnes v. Danville Street Ry. Co., 235 Ill. 566; Lasko v. Meier, 327 Ill. App. 5; Synwolt v. Klank, 296 Ill. App. 79; and Mahan v. Richardson, 284 Ill. App. 493. Recent expressions of our Supreme and Appellate courts clearly hold that the question of contributory negligence is one which is pre-eminently for the consideration of the jury. Each case must be determined from its particular facts. The question of contributory negligence cannot be defined in exact terms, and unless it can be said that the failure of the plaintiff to exercise care is so palpably contrary to the conduct of a reasonably prudent person as to show contributory negligence, the issue is one for the jury. Kelly v. Friel et al., 329 Ill. App. 651 (Abst.), citing the following recent opinions of the Supreme Court upon this subject: Blum v. Getz, 366 Ill. 273; Gnat v. Richardson, 378 Ill. 626; and Moran v. Gatz, 390 Ill. 478. In Thomas v. Buchanan, 357 Ill. 270, the court said that "Contributory negligence becomes a question of law only when it can properly be said that all reasonable minds would reach the conclusion, under the facts stated, that such facts did not establish due care and caution on the part of the person charged therewith." And in both Gnat v. Richardson and the Moran case the Supreme Court laid down the rule that whether it is negligence to cross a street-car track at an intersection ahead of an approaching street car or automobile is an issue of fact for the jury. We think the ruling in these cases is

decisive of the contention now before us.

Aside from the question of liability, defendants urge that the damages were excessive. There is no doubt that plaintiff was severely injured. Prior to the accident she had been a normal, active healthy person and was gainfully employed. Her duties as a nurse's aid required her to be in good physical condition. The accident rendered her unconscious, and except for brief intervals she did not remember anything for the following two weeks. A physical examination made a day or two after the occurrence showed that she was somewhat disoriented and suffering from brain concussion. Her abdomen was distended, and she was unable to move her right lower leg. X-ray films taken on the day of the accident disclosed multiple fractures of the pelvis. The right hip socket was distorted and had been pushed in posteriorly and practically destroyed. This fracture was comminuted in type, broken into a number of small pieces. The fragments of bone that constituted that hip socket had been pushed or driven medially or inwardly into the pelvis. The head of the femur had been driven into and had broken up the socket. There were also corresponding fractures in the region of the pubis. Two days after the accident plaintiff had to undergo an operation. A wire was put through the upper part of the femur, attached to a traction bow, and tightened. Weights were then attached to the traction bow to pull the head of the femur outward from where it had been pushed into the pelvis. Other wiring was done on the injured bones, and the hospital bed was tilted high on the right so that plaintiff's body would fall to the left. About 30 to 40 pounds of traction were applied in the way of direct pull, which was increased by tilting the bed. The traction remained on plaintiff for almost two months, during which she was unable to leave her bed and suffered much pain,

and after about two or three weeks hypodermics were administered. She had difficulty in sleeping and received constant nursing care and attention. The pelvic injury caused a temporary paralysis of the muscles of the bladder, and she had to be catheterized for about two weeks. She was also given a blood transfusion. Before discharge from the hospital December 24, 1944, plaintiff learned to walk by pushing a chair. She had lost approximately 32 pounds during her hospitalization, was carried to a cab when she left, and confined to her bed at home part of the time until January 3, 1945, when she went to her parents' farm for about two months. Then at the request of her surgeon plaintiff returned to Chicago. During that time her doctor saw her regularly, X-rayed her, and advised her as to how to take care of herself. She used a cane steadily from December 1944 until June 1945, walking with a limp and much slower thantheretofore. X-rays taken in November 1945, shortly before the trial and more than a year after the accident, showed that the right sacroiliac joint was open, that it had been spread, that as a result of the fracture the right wing of the pelvis was flared out, and also disclosed other deformities of a permanent nature. Her recuperation was attended by much pain and suffering, and although her surgeon could not state with any degree of certainty that the pain in her hip would grow progressively worse with the development of traumatic osteoarthritis which he said was certain to occur ultimately, it is reasonable to find from the medical evidence that an injury of the gravity which plaintiff sustained would leave her deformed to some degree for at least several years. Furthermore, she had to abandon her plans for a nursing career and take a position in the pharmacy of the hospital which paid her only \$125 per month as against the prospective compensation of a nurse of approximately double that amount. Under the circumstances and in view of the constant

depreciation in the purchasing power of money, a verdict for \$30,000 is not excessive. Lamar v. Collins, 252 Ill. App. 238; Howard v. Baltimore & O. C. Terminal R. Co., 327 Ill. App. 83; and Wolfe v. Railway Express Agency, Inc., 326 Ill. App. 515.

Lastly it is urged that the jury were improperly instructed. Criticism is made of plaintiff's given instruction No. 3. It is urged that this instruction is not objectionable in so far as it applies to instructions which do not direct a verdict, but as to instructions which do direct a verdict, it is in direct conflict with the prevailing rule. Hanson v. Trust Co. of Chicago, 380 Ill. 194, is cited in support of this contention. In that case the court enunciated the familiar rule that a peremptory instruction must contain all the elements necessary to sustain the directed verdict. Defendants argue that because of this rule plaintiff's given instruction No. 3, which told the jury that the instructions constituted a connected body to be applied as a whole to the facts, and that no one instruction should be separated from the others, is erroneous. The gist of the argument is that each peremptory instruction must stand alone. It appears, however, that plaintiff's mandatory instructions 4 and 11 contain all the essential elements necessary to sustain a verdict, and therefore the argument on this question is manifestly without any basis.

It is also urged that plaintiff's given instructions No. 4 and 11, as well as several instructions given at the request of the defendants, were mandatory instructions which directed a verdict, and under the law applicable to mandatory instructions, none of them should be regarded and treated in "one connected body and series" with the other instructions, and were therefore in direct conflict with the law stated in the Hanson case. As to these instructions, it was urged that there was not a particle of evidence that the motorman was not keeping a look-out or that

he failed to see plaintiff at any time that she was visible, and that therefore the instruction erroneously assumed or implied that the motorman was guilty of negligence in failing to discover plaintiff's position of danger in time to avoid injuring her. It should be noted, however, that the motorman testified that he did not see plaintiff until his car was 15 to 20 feet from her. The cases cited by defendants in support of their criticism of these instructions deal with situations in which there was no evidence to support the facts, but instructions 4 and 11 did not assume any facts which were not supported by evidence. We have examined the instructions criticised by defendants and are convinced that they could not have confused or prejudiced the jury so as to result in the verdict and judgment from which defendants appeal.

The case was fairly tried, and upon the issues of fact submitted to the jury we think they were justified in returning a verdict for plaintiff and in assessing damages in the amount of \$30,000. The judgment of the Superior Court is therefore sustained.

JUDGMENT SUSTAINED.

Scanlan and Sullivan, JJ., concur.

V.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

ICAGO.
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The judgment against defendant was predicated on a balance claimed to be due plaintiff, an attorney, for legal services rendered in the Auer litigation (Auer v. Wm. Meyer Co., 322 Ill. App. 244), which was instituted June 18, 1935 as a minority stockholders' suit against the defendants, Wm. Meyer Co., a corporation, Lina R. Meyer, individually and as executrix of the estate of William Meyer, deceased, Oliver Norder and Dwight C. Hudson, directors of the corporation. The complaint in the Auer litigation charged that the individual defendants fraudulently and wrongfully caused to be paid to themselves in excess of \$500,000 as bonuses, and sought discovery and an accounting. Shortly after that suit was filed the individual defendants came to Beerly's office with a summons issued in that cause. After withdrawing the original bill of complaint from the clerk's office and examining it, he called their attention to the fact that the suit was against the corporation as well as Lina R. Meyer individually and as executrix of her deceased husband's estate, Oliver Norden and Dwight M. Hudson, directors, and Beerly was then directed to file an

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appearance on behalf of all the parties defendant, including the corporation. They agreed that all costs and expenses, including attorney's fees connected with the defense of said litigation, were to be paid by the Wm. Meyer Co. At that time and up to June 6, 1942 Lina R. Meyer owned individually and in a representative capacity 15/18 of the entire issued capital stock of the corporation, and was its president, treasurer and one of its directors. Beerly testified that he rendered no bill for services to Mrs. Meyer at any time from June 8, 1935 up to the time of the trial in connection with that lawsuit and that Mrs. Meyer had never hired him as her attorney. Nevertheless an appearance was filed by him on behalf of Mrs. Meyer individually and in her representative capacity, and he also filed a joint and several answer in behalf of all the defendants in that proceeding.

Issue being joined, the cause was referred to a master in chancery, before whom hearings were had from November 27, 1936 until February 3, 1938. In the instant case, Beerly introduced in evidence a time sheet of his services for the period during which hearings were had before the master. The master found substantially in favor of the defendants in the Auer case, and the chancellor overruled the plaintiff's exceptions and entered a decree in accordance with the master's report. An appeal was then taken to the Appellate Court, and in an exhaustive opinion written by Mr. Justice Sullivan we reversed the decree in part and remanded the cause with directions that there be a full accounting against Mrs. Meyer individually and as executrix under her deceased husband's will for all bonuses received by her and him during the period from 1918 to and including 1934, and that the costs be taxed against her individually. A petition for leave to appeal to the Supreme

Court on behalf of all the defendants was subsequently denied, and on December 5, 1944 a decree was entered in the Circuit Court in satisfaction of the mandate issued by this court.

It appears from the evidence in this proceeding that Beerly sent to the Wm. Meyer Co. et al. his statement dated November 27, 1941 for services rendered for the period from December 28, 1937 to November 27, 1941 for \$1000, which bore a longhand notation "OK to enter for \$1000 per T.K.T. & H. S. Vaile." Subsequently, by letter of January 28, 1942 to the Wm. Meyer Co., Beerly requested payment of the sum claimed to be due him, and repeated the request in another letter dated February 4, 1942. The Meyer Co., by its letter of February 3, 1942 to Beerly, acknowledged said statement to be due, but indicated that it was financially unable to pay it. Later, on June 19, 1942 and July 18, 1944, it paid Beerly on account of his statement for services the respective amounts of \$200 and \$100. It also appears from the evidence adduced upon the hearing in this case that the accounting records of the Meyer corporation set up as a liability Beerly's statement of services for \$1000.

In July 1942 one G. D. Harris purchased all the stock owned by Lina R. Meyer, and Sidney F. Moody, Harris' attorney, testified that at the time of the closing of that transaction Beerly told him that he had a bill for legal services rendered to the Wm. Meyer Co. in the Auer litigation, that "he wanted to be sure that he was paid because he had done a lot of work, * * * and he said that he was not worried about the case, that he was sure he would be successful in the upper court and I [Moody] did not have a thing to worry about."

The Auer litigation was next called to Moody's attention when our opinion was filed on March 8, 1944. The purchasers

of the Wm. H. Meyer Co. then for the first time learned that that litigation was not a suit against the corporation but rather for its benefit, and that Lina R. Meyer was the real party defendant.

On February 23, 1945 Beerly brought the instant suit against the Wm. Meyer Co. for the balance due of \$700 on his statement of services. By way of defense the corporation averred that Beerly represented both the Wm. Meyer Co. and Lina R. Meyer, whose interests were adverse and conflicting; that in fact he substantially and exclusively represented Lina R. Meyer; and that the payments of \$300 theretofore paid by the corporation to Beerly were made under a misapprehension of facts and on the strength of Beerly's statement that he represented the corporation in the Auer litigation; and a counterclaim was filed for the return of the \$300 paid to Beerly on account. Beerly then presented a motion for summary judgment, supported by the affidavits of Lina R. Meyer and himself, which motion was denied, and on September 19, 1945 he filed an amended statement of claim making Lina R. Meyer an additional defendant in the instant proceeding and sought judgment in the alternative against her for his legal services. After the close of Beerly's case in the Municipal Court Lina R. Meyer was dismissed out of the suit, and thereafter, on March 8, 1946, the court entered judgment for Beerly for \$850 and against the Wm. Meyer Co. on its counterclaim.

The facts, circumstances and controversies in the Auer litigation are fully set forth in our opinion and need not be repeated here. In view of our findings as to the nature of the services rendered by Beerly, defendants urge as ground for reversal in this cause that the interests of the corporation and those of Lina R. Meyer in the Auer litigation were adverse,

conflicting and antagonistic; and that contracts of legal employment to represent adverse, conflicting and antagonistic interests in the same litigation, even though approved or ratified, are against public policy. Even a cursory reading of our opinion in the Auer litigation clearly indicates that the plaintiff in that proceeding as a minority stockholder was seeking an accounting of the wrongful and fraudulent misappropriation of \$500,000 of the corporation's assets. The recipients of the funds wrongfully diverted were Lina R. Meyer and her husband in his lifetime. Her interests were of course best served by retaining the funds so received, which necessitated a vigorous defense on her part. Her attorney, Beerly, certainly presented such a defense. On the other hand, the interests of the corporation would have been best served by a full disclosure of all the facts resolved in the Auer litigation and discovery and return of all funds wrongfully misappropriated by its officers, as claimed in the stockholders' minority suit. In fact the corporation was in legal effect the plaintiff in that litigation, and Beerly admitted that any recovery in such a proceeding was for the benefit of the corporation.

We consider it unnecessary to elaborate upon the various circumstances which led us to conclude in our opinion in the Auer litigation that Beerly in fact represented only the interests of Mrs. Meyer, which were antagonistic to those of the corporation which he also purported to represent. For instance, he did not file any objections to the master's report limiting the accounting to a period subsequent to June 18, 1930. One of the principal controversies in the Auer litigation was whether the accounting should date back to 1918, and of course the interests of the company were best served by having such an

the accounting should date back to 1913, and of course the in-
the principal controversy in the year litigation was whether
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he did not give a reference to the company's report limiting
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various cases, and the amounting to the various
condition.

accounting. Plaintiff there properly filed objections to the finding of the master, and his objections on this point were sustained in our opinion. Again, Beerly filed no objection to the master's report assessing all the costs against the corporation and none against the wrongdoer, Lina R. Meyer. Plaintiff filed objections to the master's finding, and we sustained his position with the following observation: "That the costs should have been assessed against defendant Mrs. Lina R. Meyer, individually, and not against the Meyer Co. is self evident, and the mere statement of this proposition is sufficient without further comment." It furthermore appears that Beerly was overzealous in opposing full disclosure of all facts relating to the alleged wrongful misappropriation of funds by means of bonuses and royalty payments. Our view on that phase of the litigation is appropriately set forth on pages 266-267 of the opinion. The filing of a petition for rehearing by Beerly after the rendition of our opinion, and his petition for leave to appeal to the Supreme Court to secure reversal thereof, further indicate that Beerly's primary interest was in representing Mrs. Meyer and in actively opposing the best interests of the corporation.

This leads to a consideration of the generally accepted rule in this and other states that an attorney cannot recover for legal services where he represented adverse, conflicting and antagonistic interests in the same litigation. Strong v. International Invest. Union, 183 Ill. 97; Gary v. Beadles, 202 Ill. App. 58. The rule is well epitomized in Gilliam v. Saunders, 204 N.C. 206, 167 S.E. 799, where the court said that "the unamendable mandate of both law and morals forbids an attorney, in the homely phrase of the fields, 'to run with the rabbits and bark with the hounds,'" and in Sun Building & Loan Ass'n of Newark v. Rashkes, 119 N.J. Eq. 443, 183 Atl. 274, where the

court quoted from Matt. vi, 24-33, as follows: "'No man can serve two masters; for either he will hate one, and love the other, or he will cling to one, and slight the other. Ye cannot serve God and mammon.'"

It is urged by plaintiff, however, that a minority stockholders' suit against a corporation and its majority stockholders represents two causes of action, and that the dual nature of the proceeding does not deprive the corporation of the right to defend through counsel of its own choosing and to retain the same counsel to represent the majority stockholders and directors individually, citing Otis & Co. v. Pennsylvania R. Co., 57 F. Supp. 680, Taylor v. Rosehill Cemetery Co., 210 Ill. App. 209, and other decisions. The distinguishing feature of decisions so holding lies in the circumstances of each case. In Taylor v. Rosehill Cemetery Co., upon which plaintiff relies, the court held, among other things, that in a minority stockholders' suit where the majority interests are charged with fraud, an attorney cannot recover from the defendant corporation for services rendered in defending the majority interests where he "was in some way a party to the alleged fraud, or at least had full knowledge of it." Counsel for plaintiff argue that in the case at bar the defendant corporation does not allege that plaintiff was a party to the fraudulent action of the majority interests. While that may be conceded to be true, he certainly "had full knowledge of it," as we pointed out in our opinion at pages 266-267. In an endeavor to avoid the findings and characterizations of plaintiff's knowledge as set forth in our opinion, plaintiff now contends that the opinion is not in evidence, but he evidently overlooks the fact that he introduced it in evidence and attached it as part of his petition for leave to appeal in the Supreme Court.

court quoted from *Walt, v. ...*, as follows: "The man can serve two masters; for either he will love one, and love the other, or he will cling to one, and fall to the other. Ye cannot serve God and mammon."

It is urged by the plaintiff, however, that a minority

stockholders' suit against a corporation is its majority

stockholders' representative in a suit of action, and that the

dual nature of the proceeding is not proper in the corporation

of the right to demand a suit in the name of the corporation and

to retain the same control as if the majority stock-

holders and directors had been the parties.

Comptroller v. ..., *... v. ...*, *... v. ...*

Comptroller v. ..., *... v. ...*, *... v. ...*

distinction is made between the two in the

circumstances of each case. *... v. ...*

On the other hand, it is said, the plaintiff, among other

things, that in a minority stockholders' suit, the majority

interests are not of the plaintiff, but of the corporation from

the defendant corporation, and that in the latter case the

majority interest is not in the corporation, but in the pl-

leged firm, or at least in the majority of it. Counsel for

plaintiff argues that in the latter case the defendant corporation

does not allege that it is a party to the transaction

action of the majority interest. This, it may be conceded

to be true, but certainly "and still more so of it," as we

pointed out in our opinion at pages 206-207. In an endeavor

to avoid the things and characterizations of plaintiff's

knowledge as set forth in our opinion, plaintiff now contends

that the opinion is not in evidence, but he evidently overlooks

the fact that he introduced it in evidence and attached it as

part of his petition for leave to appeal in the Supreme Court.

We think that within the current weight of authority and under the circumstances of the Auer litigation, plaintiff's sole defense of Mrs. Meyer's interest, with knowledge of the facts in his possession, precludes him from recovering fees from the Meyer Co. for services which were clearly detrimental to the corporation.

Lastly it is urged that the corporation had approved or ratified his dual employment in representing adverse interests, and therefore it cannot now deny its liability for such services. This contention is predicated upon the approval of Beerly's statement by Messrs. Trojan and Vaile, the latter an officer of the corporation, acknowledgment of such statement in defendant's letter of February 3, 1942 to Beerly, the payment of \$200 on June 19, 1942 and of \$100 on July 18, 1944 by the Meyer Co., and the establishment of alleged accounts and balance sheets setting forth said liabilities to Beerly. As we understand the rule these circumstances would not purge the employment of being against public policy. It is manifest that Beerly represented to Moody that the Auer suit was against defendant and that Moody had nothing to worry about. The real facts were called to Moody's attention after the rendition of this court's opinion, and until then the actual nature of the litigation was withheld or suppressed. A similar contention was made in Strong v. International Invest. Union, supra, where the court, quoting from the Appellate Court, held that "'Some decisions may be found which hold that when an attorney at law acts with the consent of both adverse litigants in the character of an umpire for the determination of their differences, there is then no inconsistency in such employment. But where the employment for each is to protect the respective and conflicting interests as they may arise in the litigation, it is generally

held to be against public policy to allow a recovery of compensation. In Herrick v. Catley, [30 How. Pr. 208], and in McDonald v. Wagner, [5 Mo. App. 56], the client sought to be held in each instance was aware of the employment by the adverse litigant when the inconsistent employment was entered into, and in the McDonald case there was a very complete ratification by the giving of a promissory note for the fees charged after the services had been rendered; yet it was held that the contract could not be enforced, as it was against public policy.'" The facts in this case do not permit a recovery upon the theory of approval and ratification because the officers of the corporation certainly did not have full knowledge of the nature of the litigation and plaintiff's part therein when they approved Beerly's statement of services and made payments on account thereof.

With respect to defendant's counterclaim for the return of monies paid to Beerly on account, we find authority in Apfel v. Auditore, 223 App. Div. 457, 228 N.Y.S. 489, for the trial court's disallowance of defendant's counterclaim. In that case the court held that "The amount of the plaintiff's recovery against the corporations should be limited to the value of the labor of entering a nominal appearance for the corporations and formally appearing for them." Beerly rendered such services for the Meyer Co., and although the \$300 paid to him on account may be considered excessive for the nature of those services, we think the trial court properly disallowed the counterclaim.

For the reasons indicated, that portion of the judgment order of the Municipal Court assessing plaintiff's damages at \$850 is reversed, and that portion of the judgment order finding the issues against the defendant on the counterclaim is affirmed.

JUDGMENT ORDER AFFIRMED IN
PART AND REVERSED IN PART.
Scanlan and Sullivan, JJ., concur.

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MORRIS INVESTMENT COMPANY,
a corporation,

Appellant,

v.

MARY MOORE,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in forcible detainer in the Municipal Court to recover possession of premises known as Room No. 2, second floor, 4305 Vincennes avenue, Chicago. Trial by the court without a jury resulted in a finding and judgment for defendant, from which plaintiff appeals.

Plaintiff contended upon trial that the premises were devoted to business purposes and therefore not subject to the rules of the O.P.A., and that the tenancy of the defendant could be and was terminated by service of a 30-day notice. In support of this contention its counsel offered to prove by various exhibits that the question whether defendant's apartment was used for living accommodations or business uses had been previously decided by the Superior Court of Cook County in a suit instituted by the O.P.A. against the investment company for the purpose of restraining certain alleged violations of the rental regulations. The court refused to admit these exhibits, and it is urged that if admitted, they would have established a prior adjudication as to the character and occupancy of the premises involved in this case.

In the Superior Court proceeding Chester A. Bowles, as O.P.A. administrator, charged the investment company with having engaged in acts and practices which constituted violations of section 4 of the Emergency Price Control Act of 1942, as amended, and sought to enjoin such acts or practices and enforce com-

1988

THE STATE OF NEW YORK
IN SENATE

JANUARY 1988

REPORT

OF THE

COMMISSIONERS OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE

ON MAY 1, 1987, CONCERNING THE PROTECTION OF THE

ADIRONDACK PARK AND THE CATAWAUGUS RIVER

FROM THE EFFECTS OF LOGGING AND OTHER FOREST

MANAGEMENT ACTIVITIES

AND THE EFFECTS OF LOGGING AND OTHER FOREST

MANAGEMENT ACTIVITIES ON THE ADIRONDACK PARK

AND THE CATAWAUGUS RIVER

AND THE EFFECTS OF LOGGING AND OTHER FOREST

MANAGEMENT ACTIVITIES ON THE ADIRONDACK PARK

AND THE CATAWAUGUS RIVER

AND THE EFFECTS OF LOGGING AND OTHER FOREST

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pliance with the statute. The regulations involved provided that a landlord of any housing accommodation rented on March 1, 1942 should not demand or receive therefor rent in excess of that paid on the above date, and required every landlord to file a registration statement setting forth information with respect to the rent, the services and the equipment provided. In that proceeding the plaintiff here was made defendant as the owner, operator or manager of the building at 4305 Vincennes avenue, which received or was entitled to receive rent for the housing accommodations offered on the premises, and it was charged that the second apartment located at 4305 Vincennes avenue was occupied on March 1, 1942 at a rental of \$65 per month, which constituted the maximum rent under section 4 of the Rent Regulation Act, and that since July 1, 1942 and until July 1, 1944 defendant demanded and received \$67.50 per month rental, in violation of the statute.

The abstract of record containing the rejected exhibits shows that although Mary Moore was not joined as a defendant in the Superior Court suit, nevertheless she filed an affidavit stating that she occupied the apartment in question at 4305 Vincennes avenue and had personal knowledge and information of the fact that the agent for the Morris Investment Company, which operated the building, had sought to raise the rental of her apartment or space from \$65 a month to \$67.50 a month beginning July 12, 1942; and in pursuance to her affidavit and others of a similar nature the Superior Court suit was instituted for the benefit of numerous tenants as a class. It is clear that although she was not a defendant in that proceeding, her interest in the litigation was the

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same as that of other tenants in whose behalf the suit was instituted, and if the O.P.A. administrator had prevailed in that proceeding, Mary Moore would have benefited to the extent of recovering excess payments with penalties and having the amount which she was paying as rental continue at \$65 instead of \$67.50.

The rejected exhibits make repeated reference to the premises in question. Paragraph 11 of the complaint in the Superior Court proceeding specifically described apartment 2, located at 4305 Vincennes avenue in Chicago, as one of the apartments for which Morris Investment Company demanded and received rental in excess of the alleged maximum, in violation of the Rent Regulation Act. Paragraph 10 of defendant's answer averred that the premises were used as a beauty shop, and therefore not subject to the maximum price regulation, and that any failure to register the premises was not a violation of the act. Paragraph 20 of the decree found that "plaintiff moved to dismiss such portions of the amended complaint [referring to the second apartment at 4305 Vincennes avenue] for the reason that the plaintiff represented unto this Court and could not prove or sustain the allegations contained therein and that said paragraphs of the amended complaint were dismissed."

From the rejected exhibits it clearly appears that whether or not the premises in question were living accommodations was directly put in issue in the Superior Court case; and this record likewise shows that the same question was directly involved in the trial of the case at bar in the Municipal Court. The legal proposition therefore presented is whether the defendant in this proceeding, Mary Moore, was bound by such adjudication in the Superior Court. Her counsel

contend that a prior proceeding cannot operate as an adjudication, an estoppel or a bar unless there were: (1) identity of the thing sued for or question to be decided, (2) identity in the cause of action, and (3) identity of persons or parties; and it is urged that the questions at issue in the Superior Court and subsequently in the Municipal Court were dissimilar, that the causes of action - an injunction proceeding in the Superior Court and a forcible entry and detainer action in the Municipal Court - were different, and that the defendant in the Municipal Court was not a party to the Superior Court case. The authorities cited by defendant do not sustain these contentions. The applicable rule is well stated in Freeman on Judgments, vol. 1, 5th ed., by Tuttle, sec. 430, as follows: "It is therefore obvious that there is a numerous and important class of persons who, being neither parties upon the record nor acquirers of interests from those parties after the commencement of the suit, are nevertheless bound by the judgment. Persons who are parties in fact though not parties of record are bound by the judgment. These include persons who are represented by parties of record, those who by reason of their relation to parties are bound when notified to appear and defend for the latter, persons participating in the litigation in defense of their own interests, and persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person." (Italics ours.) Mary Moore certainly falls within the italicized portion of this statement. In the early and leading case of Hanna v. Read, 102 Ill. 596, which is cited with approval in most of the later decisions, it appeared that an Indiana court had held that a deceased grantor, at the time of making a conveyance of lands in that

state, was insane and incapable of doing business, and the court had set aside the conveyance to his wife. The Illinois Supreme Court held that such adjudication was competent evidence to establish the fact of the grantor's insanity in a suit, between substantially the same parties, to avoid a conveyance of lands in this state made by the same grantor and at the same time the deed was made to the Indiana lands, and the court here said that "Where the former adjudication is relied on as an answer and bar to the whole cause of action, or, in other words, where it is claimed to be an answer to all the questions involved in the subsequent action, then it must appear, as claimed by defendants in error, that the cause of action and thing sought to be recovered are the same in both suits. The former adjudication in cases of this class is technically known as an estoppel by judgment, and the judgment itself is commonly characterized as a bar to the action; but where some specific fact or question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not."

More recently, in Hoffman v. Hoffman, 330 Ill. 413, the court laid down the rule as follows: "Where some controlling fact or question material to the determination of both causes has been adjudicated in the former suit by a court of competent jurisdiction and the same fact or question is again at issue between the same parties, its adjudication in the first cause will, if properly presented, be conclusive of the same question in the later suit, irrespective of the question

whether the cause of action is the same in both suits or not"; and in People v. Hart, 332 Ill. 467, the rule was again announced as follows: "To operate as an estoppel by verdict it is absolutely necessary that there shall have been a finding of a specific fact in the former judgment or record that is material and controlling in that cause and also material and controlling in the pending case. It must also conclusively appear that the matter of fact was so in issue that it was necessarily determined by the court rendering the judgment interposed as a bar by reason of such estoppel." The same rule was enunciated and followed in Bechtel v. Marshall, 236 Ill. App. 549, where Hanna v. Read was again quoted with approval, and also in Lightcap v. Bradley, 186 Ill. 510, and Ward v. Clendenning, 245 Ill. 206.

We think the foregoing decisions support the rule that one, even though not a party to a proceeding, may be bound by a judgment or decree entered therein if it appears that the suit was instituted for his or her interest or for his or her benefit or that he or she assisted or advised in such a proceeding. The rejected exhibits clearly show that there was a privity of interest between plaintiff in the Superior Court proceeding and Mary Moore, the defendant herein. In fact she was one of those persons on whose behalf (as indicated by her affidavit) the Superior Court suit was prosecuted in the name of Chester A. Bowles, the rent administrator.

It follows from these conclusions that the exhibits offered in evidence should have been admitted and that it was error to reject them. Since the exhibits are amply set forth in the record in this proceeding it would serve no useful purpose to retry the case. Therefore the judgment of the Municipal Court is reversed and the cause remanded to that

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court with directions that judgment for possession be entered in favor of plaintiff, Morris Investment Company.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

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concern with the question of the possibility of being
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332 I.A. 654

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RUTH CURTIS, also known as Ruth
McCree, insane, by J. Harold
Mosely, Conservator of her
estate,
Plaintiff,

v.

LILLIAN McCULLAN, WALLACE SMITH,
J. HAROLD MOSELY, Executor of the
Estate of Ella Malone, deceased,
and Unknown Owners,
Defendants.

HAROLD WARNER,
Appellee,

v.

LILLIAN McCULLAN,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

309

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Lillian McCullan appeals from an order of the Circuit Court allowing Harold Warner's petition for a writ of assistance putting him in possession of the premises in question.

Appellant's counsel has filed no statement of the case, as required by the rules of this court, and we therefore take the facts, which are apparently conceded to be correct, from Warner's brief. It appears that the original action was for partition of certain real estate filed under the title of J. Harold Mosely, Conservator of the Estate of Ruth Curtis, v. Lillian McCullan et al., and unknown owners of the premises known as 3420 Calumet avenue, Chicago. The complaint alleged that Ella Malone, who died on August 27, 1934, by her will, bequeathed to Ruth Curtis all the real estate of which the testatrix had been seized upon her death, and by virtue of the terms of the will Ruth Curtis became the owner of an undivided one-half interest as a tenant in common of the premises; and that in accordance with

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the heirship of John W. Winfield, who at one time owned the other one-half interest, on the date of the filing of the complaint the premises involved were owned in fee simple in the following proportions: Ruth Curtis, 25/36, Lillian McCullan, 7/36, and Wallace Smith or his unknown heirs, 4/36.

The complaint further alleged that Ruth Curtis had been declared insane; that the plaintiff, J. Harold Mosely, was appointed conservator by order of the Probate Court; and that on March 12, 1942 he was given leave to file proceedings to enforce the rights of his ward, Ruth Curtis. The complaint sought partition of the premises.

Lillian McCullan was duly served and filed her answer, in which she claimed no homestead right. On May 22, 1945 Mosely, as conservator, filed his petition requesting an order substituting Ruth Curtis as plaintiff in lieu of the conservator, and in response to his petition the court on June 14, 1945 entered an order changing the title of the cause accordingly. Thereupon Lillian McCullan filed an answer setting up various defenses. The case was referred to a master in chancery, who filed his report finding the facts as alleged in the complaint and recommending that a decree of partition be entered. Lillian McCullan's exceptions to the report were overruled, and a decree of partition was entered on October 8, 1945 and became final by reason of the dismissal of an appeal therefrom in the Appellate Court.

Pursuant to the decree, commissioners thereafter appointed filed their report finding that the premises were not susceptible of division without manifest prejudice to the rights of the parties in interest, and a decree of sale was entered on December 3, 1945. An appeal from this decree was also dismissed in the Appellate Court. At a master's sale held on December 18, 1945 the

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premises were sold to Harold Warner for the sum of \$3100.

Lillian McCullan filed the following exceptions to the master's report of sale: (1) that the daughter and the husband of Ruth Curtis, and the husband of Lillian McCullan were not made parties to the suit; (2) that certain issues raised in the amended answer were not disposed of in the decrees entered; (3) that the premises in question were the homestead of Lillian McCullan; and (4) that the issue as to the partition of the property was raised and not disposed of. January 18, 1946 the court overruled all these exceptions and approved the master's report of sale. No appeal was taken from this decree.

Also on January 18, 1946 Lillian McCullan filed her petition to set aside a homestead in the premises, and by an order entered on that same day the petition was denied. The appeal from that order was also dismissed by the Appellate Court.

Subsequently on June 7, 1946 Warner filed his petition for a writ of assistance setting up that a decree of sale was entered in December 1945; that a sale was held pursuant thereto, at which he purchased the premises involved for \$3100; that the sale was duly approved by an order of the Circuit Court; that he paid the full amount of the purchase price; and that on February 9, 1946 the master executed and delivered to him a deed of the premises which was duly recorded; that Lillian McCullan and Ruth Curtis' daughter Bernice were then occupying the premises; and that petitioner was entitled to possession thereof. Accordingly he prayed that a writ of assistance be issued.

Lillian McCullan's answer set up the same defenses which she had previously urged and which had been overruled by the court in entering its several decrees.

premises were all to travel further for the sum of \$3100.
William's wife filed the following exceptions to the
master's report of value: (1) That the daughter and the husband
of both parties, and the sons of William McMillan were not
made parties to the suit; (2) That certain items raised in the
amended answer were not included in the master's report; (3)
That the master's report was not based on the testimony of William
McMillan and that it was based on the testimony of the
property, as raised by the master's report, January 17, 1940 the
court overruled the master's report and ordered the master's
report to be set aside. The court also ordered
also on January 17, 1940 the court ordered her
petition to be set aside, and by an
order entered on January 17, 1940 the court was advised. The
appeal from the order of the court was affirmed.
Court.
Accordingly on January 17, 1940 the court affirmed his petition
for a writ of assistance, and the order of sale was
entered in response to the petition. The court further there-
to, at which he paid the sum of \$3100; that
the sale was duly carried out in accordance with the court's order;
that he paid the full amount of his purchase money; and that on
February 9, 1940 the master entered and delivered to him a
deed of the premises which he had received; that William
McMillan and his wife's names were then appearing
the premises; and that petitioner was entitled to possession
thereof. Accordingly he prayed that a writ of assistance be
issued.
William McMillan's answer set up the same defenses which
she had previously urged and which had been overruled by the
court in entering its several decrees.

On June 27, 1946, after a hearing upon the petition and answer, the court found that the petitioner became the owner of the premises involved by virtue of the master's deed, and ordered that a writ of assistance issue to put him in possession of the property. From this order Lillian McCullan has taken an appeal. The only record before us with respect to that order is the filing of the petition by Warner, the rule to answer, the answer of Lillian McCullan, and the order entered by the court directing that the writ issue. There is no report of proceedings as to what occurred at the hearing of June 27, 1946, and no evidence or proceedings are incorporated in the transcript of record with reference to the hearing held on that date.

Upon this state of the record Lillian McCullan's counsel filed a brief urging nine separate legal propositions as ground for reversal without stating any supporting facts. One of the grounds urged is that the rights secured by the Homestead Act can be lost only by release or abandonment in the mode pointed out by statute, and that accordingly it was error to deprive the appellant of her homestead. A concise answer to this contention is that the question of the right of homestead was disposed of by the decree of January 18, 1946, from which no appeal is pending, and that question cannot be relitigated on this appeal. Lillian McCullan's position upon trial was that she had possession of the property pursuant to an order of the Probate Court. If that be true, she did not become entitled to a homestead.

Another ground urged for reversal is that the Circuit Court erred in assuming jurisdiction of the partition suit because the matter was pending in the Probate Court. It appears, however, that the Probate Court granted the conservator express leave to proceed with the partition suit. Moreover, the Probate Court had no jurisdiction over, and could not assume jurisdiction of, such

a proceeding.

In another **objection** counsel argues that it was error on the part of the Circuit Court to allow a conservator to partition and sell the real estate of his ward. No appeal was taken from the decree of partition, and therefore the point cannot now be urged.

We are unable to find any merit in any of the other grounds urged for reversal. The salient fact is that Warner became a purchaser in good faith for value at a judicial sale and cannot be divested of his title because of any claimed error in a decree which became final, either because no appeal was taken or because the appeal was dismissed. He was entitled to a writ of assistance and to possession of the premises. Pending this appeal a motion, which was reserved to hearing, was made to dismiss the appeal because of the failure of the appellant to file a record within the time allowed by law. In view of our conclusion that the appeal is without merit, the motion to dismiss the appeal will be denied and the judgment of the Circuit Court affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

332 I.A. 655

44128

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error,

v.

DONALD ENRIGHT,

Plaintiff in Error.

ERROR TO THE CRIMINAL
COURT OF COOK COUNTY.

310

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

Donald Enright was indicted on several counts in the Criminal Court for burglary and receiving stolen property. On March 25, 1946 his plea of not guilty was withdrawn, and he entered a plea of guilty to that count of the indictment which charged him with receiving stolen property. Upon testimony stipulated to in open court he was found guilty and then moved the court to release him on probation. His motion was duly entered and continued for hearing to May 10, 1946. In the interim an investigation had been made which disclosed that this was defendant's first offense, and on the date set for hearing he was released on probation for a period of two years upon his own recognizance of \$500. The probation order provided that restitution be made of \$1800, of which \$100 was paid in open court on the day of the hearing, and under the provisions of the order the balance was to be paid at the rate of \$60 per month. The record further discloses that Enright had paid an additional \$300 on April 6, 1946, and several of the monthly payments, thus increasing the amount which he had paid by way of restitution to more than \$500. This was in excess of the amount that he would have been required to pay at the rate of \$60 per month.

On October 21, 1946 defendant appeared in court with one Tomaso, a probation officer, at which time his probation was terminated and revoked, and he was sentenced to the peni-

THE PEOPLE OF THE STATE
OF ILLINOIS,

vs.
JAMES EARL RAY,
Defendant.

CHARGE: MURDER.

THE STATE OF ILLINOIS, by and through the Attorney General, complains against the Defendant, JAMES EARL RAY, for the crime of MURDER.

That the Defendant, JAMES EARL RAY, is a male white person, born on May 19, 1924, at Motouka, Tennessee.

That the Defendant, JAMES EARL RAY, was arrested on March 2, 1969, at London, Kentucky, and taken to the Federal House of Detention at Joliet, Illinois, where he is now being held. That the Defendant, JAMES EARL RAY, is a person of low intelligence and is unable to read or write. That the Defendant, JAMES EARL RAY, is a person of low moral character and is a habitual criminal.

That the Defendant, JAMES EARL RAY, was indicted on March 10, 1969, for the crime of MURDER, and was arraigned on the same day. That the Defendant, JAMES EARL RAY, pleaded guilty to the crime of MURDER.

That the Defendant, JAMES EARL RAY, was sentenced to the State Penitentiary at Joliet, Illinois, for a term of 99 years and 99 days. That the Defendant, JAMES EARL RAY, was sentenced to the State Penitentiary at Joliet, Illinois, for a term of 99 years and 99 days. That the Defendant, JAMES EARL RAY, was sentenced to the State Penitentiary at Joliet, Illinois, for a term of 99 years and 99 days.

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tentiary on his former plea of guilty for a period of not less than one year nor more than ten years. Two days thereafter defendant, by his counsel, moved to vacate the sentence, and in support of his motion presented a verified petition alleging that he had paid an aggregate of \$1600 toward restitution; that while defendant was making restitution his wife gave birth to a child; that expenses owing to and on account of her sickness and the sickness of her child caused defendant to fall into arrears in his payments through no fault of his own; that he was not wilful in his violation of the probation order; and that he would be able within ten days to make restitution in full to the complete satisfaction of the court; and accordingly he petitioned the court that his case be reopened and that he be given the right to a hearing so that the various matters alleged in his petition might be substantiated and considered. The court promptly overruled his motion, to which counsel excepted, and this appeal from the court's order overruling the motion followed.

The scant bill of exceptions presented does not show by what process defendant was brought before the court on October 21, 1946, when the order of probation was revoked. The only persons appearing before the court on that day were the assistant state's attorney, the defendant and the probation officer. The assistant state's attorney informed the court that he had reinstated the proceeding in order to call to the attention of the court the fact that defendant was not making payments as provided in the probation order, and advised the court that the defendant, as well as the probation officer, was present. No evidence was presented, and defendant was given no opportunity to show cause or to introduce any evidence to controvert the charge that he had violated the probation order. The record of the

tentary on his former place of duty for a period of not less than one year nor more than ten years. Two days thereafter defendant, by his counsel, moved to vacate the sentence, and in support of his motion presented a verified petition alleging that he had paid an aggregate of \$1000 toward restitution; that while defendant was making restitution his wife gave birth to a child; that expenses owing to and on account of her sickness and the sickness of her child caused defendant to fall into arrears in his payments toward the restitution; that he was not willful in his violation of the probation order; and that he would be able to pay the balance of the restitution in full to the court within a reasonable time; and accordingly he petitioned the court for a writ of habeas corpus and that he be given the right to a new trial in the various matters alleged in his petition and to be heard and considered. The court properly overruled his motion, and his counsel excepted, and this appeal from the court's order overruling the motion followed.

The second bill of exceptions presented does not show by what process defendant was brought before the court on October 21, 1940, when his order of probation was revoked. The only persons appearing before the court on that day were the assistant state's attorney, the defendant and the probation officer. The assistant state's attorney informed the court that he had reinstated the proceeding in order to call to the attention of the court the fact that defendant was not making payments as provided in the probation order, and advised the court that the defendant, as well as the probation officer, was present. No evidence was presented, and defendant was given no opportunity to show cause or to introduce any evidence to controvert the charge that he had violated the probation order. The record of the

proceedings consists of a few interrogatories by the court as to where defendant had resided since the probation order was entered, and as to how he had been employed during the interim, and the court's severe criticism of the probation officer for not having made a report, by reason whereof the officer was ordered taken into custody for interfering with the administration of justice. From some kind of written memorandum which the probation officer had in his possession, the court concluded, without hearing any evidence, that defendant was guilty of "repeated violations" of the order. At the conclusion of the hearing the matter was disposed of as follows: "Vacate the order of probation. Sentenced on the original plea and judgment one to ten years. Take him in custody and recommendation the maximum be served."

Section 789 of the Criminal Code (Ill. Rev. Stat. 1945, ch. 38) contains the following applicable provisions: "At any time during the period of probation, the court may, upon report by a probation officer or other satisfactory proof of the violation by the probationer of any of the conditions of his probation, revoke and terminate the same and issue a warrant for the arrest of the probationer, which * * * may be served by any probation officer in the state or by any officer authorized to serve criminal process in any city or county in the state. Upon the probationer being brought before the court for violation of his probation, the court may enter a rule upon the probationer to show cause why his probation should not be terminated and judgment entered, and sentence imposed upon the original conviction and release upon bail shall be allowed as in other cases."

The state takes the position that the statute makes it mandatory upon the court to impose sentence if, in his opinion, the interest of justice requires it (Ill. Rev. Stat. 1945, ch.

proceedings conducted by the court in
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The state takes the position that the statute makes it
mandatory upon the court to suppress evidence in his opinion,
the interest of justice requires it (Ill. Rev. Stat. 1943, ch.

38, sec. 789): that the issuance of a rule to show cause why probation should not be terminated is wholly discretionary with the court under the statute, since the word "may" therein is not followed by words of absolute prohibition; that probation is not a right of defendant but is an act of grace and clemency; that formal hearings and formal proceedings are not necessary to the revocation of probation, it being sufficient if it appears that probationer has not conducted himself in accordance with his duty; that the court could summarily inquire into the conduct of the probationer and impose sentence without formal trial of the issue whether he had violated probation conditions; that the Appellate Court is not warranted in disturbing judgment revoking probation and sentence of defendant under his plea of guilty unless the trial judge acted arbitrarily and abused his discretion. In support of these various propositions numerous cases are cited, some in this and other states, as well as various decisions coming under the Federal jurisdiction. We do not consider it necessary to enter into an extended discussion as to the applicability of these various decisions because it seems to us, upon a careful review of the bill of exceptions, that the letter and spirit of the Criminal Code relating to probation (Ill. Rev. Stat. 1945, ch. 38, sec. 784 et seq.) were utterly disregarded. It does not appear by what process defendant was brought before the court; no written charges, either by way of petition or affidavit, were preferred against him as to any violations of the probation order; he was not represented by counsel but was summarily brought in by the probation officer; he was not ordered to show cause, nor afforded an opportunity to present evidence to controvert the court's conclusion that he had been guilty of repeated violations of the order; neither did the probation officer who brought defendant into court make any

report or submit any "satisfactory proof" of violation by the probationer of any of the conditions of his probation. The written memorandum from which the court concluded that defendant was in arrears itself showed that he had made restitution in excess of \$500, and if, as he alleged in his petition, he had paid in the aggregate amount of \$1600, he would certainly not have been guilty of violation of the probation order entered on May 10, 1946, which required him to pay only \$60 a month. The probation order was revoked October 21, 1946, less than six months after probation was granted, and during that time he would have been required to pay only \$360. In any orderly proceeding and under a rule to show cause we may fairly assume that defendant could have proved that he was not in arrears and that he had not violated the order. As a matter of fact he was not asked any questions as to payments made by him. The court assumed from the written memorandum taken from the probation officer that defendant was in arrears and revoked the order of probation without inquiring into the facts.

People v. Cahill, 300 Ill. 279, is the only case called to our attention which deals with the question whether the formal entry of a rule on defendant is required. In that case the court, commenting on the record before it, said that "The record does show that there was no formal entry of a rule on the defendant, as required by the act, to show cause why his probation should not be terminated and judgment entered, but it does sufficiently appear that there was a hearing before the court upon that very question, and that the defendant undertook to show cause why he should not be sentenced, etc., and that the court found that he should not be sentenced but should be re-committed to the care of the probation officer." The implication in that decision is that the entry of a rule is re-

quired so that a probationer may be allowed to show cause why he should not be sentenced. In People v. Prell, 299 Ill. App. 130, defendant was found guilty under an information filed by one Bewersdorf of driving an automobile with a wilful and wanton disregard for the safety of persons or property, contrary to the statute. He was released on probation under recognizance without surety in the sum of \$500. Like the case at bar, the record in that case disclosed nothing more until he was subsequently brought before the court. Neither that record nor the one before us indicated by what process defendant appeared. Also like the case at bar, there was no report filed by the probation officer nor accusation filed by anybody else, nor was any rule to show cause entered. Nevertheless the court revoked defendant's probation and sentenced him on his original plea. In commenting on these circumstances Mr. Justice Matchett, speaking for the court, made the following observation: "There is nothing in this record which would give the court jurisdiction to revoke defendant's probation. (People v. Huyvaert, 209 Ill. App. 40.) The proceedings were unusual, **contrary to the spirit and purpose** of the Probation Act and beyond the jurisdiction of the court. The judgment will therefore be reversed and the defendant discharged."

Within the language of the applicable statute and under the cases cited, we think that a person who has been placed on probation is entitled to a hearing upon the question of whether or not he has complied with the conditions imposed, and that such hearing must be according to some well recognized and established rules of procedure. It would be a simple act for the probation officer to file a petition or other written pleading setting forth the facts relied upon for the suspension of sentence, and the defendant should then be given an opportunity

to answer or plead to the charge made, and a hearing, even though informal, as the state contends it may be, should be had, from which it could at least be fairly determined whether the defendant had violated the conditions of his probation. In this case the probation was revoked without applying any of the recognized and established rules of judicial procedure.

For the reasons indicated the order appealed from is reversed and the cause is remanded with directions that defendant's petition to vacate the order revoking probation and sentencing him to the penitentiary be allowed, and that such other proceedings be had as are not inconsistent with the views herein expressed.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

43921

332 I.A. 655²

PATTERSON MANUFACTURING COM-
PANY, Division of the Pat-
terson Corporation, an Ohio
Corporation,

Appellee,

v.

L. O. STEWART, doing business
as LYNN STEWART COMPANY,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Patterson Manufacturing Company, division of the Patterson Corporation, an Ohio corporation, sued L. O. Stewart, doing business as Lynn Stewart Company, for \$2,022.43 plus interest in the sum of \$71.95, totaling \$2,094.38, upon an account stated. The answer of defendant denied that he owed plaintiff the sum of \$2,022.43 or any other amount. Defendant also filed a counterclaim in which he claimed that plaintiff was indebted to him in the sum of \$2,451.84. Plaintiff filed an answer to the counterclaim in which it denied that it was indebted to defendant, counterplaintiff, in any amount. The cause was tried by the court without a jury. Upon the claim of plaintiff the court found the issues against defendant and assessed plaintiff's damages in the sum of \$2,022.43. Upon the counterclaim the issues were found against plaintiff and defendant's damages were assessed in the sum of \$150. Judgment was entered upon the findings. Defendant, L. O. Stewart, doing business as Lynn Stewart Company, appeals.

In October, 1943, the parties entered into an agreement whereby defendant was to occupy and use a factory belonging to plaintiff, located at New Philadelphia, Ohio, for the manufacture of storage batteries. The agreement provided that defendant should pay plaintiff a minimum rental of \$500 per month and

PATTERSON PATENT
PARK, Division of
Patterson Corporation,
Corporation

AMERICAN PATENT
AND TRADE MARK
OFFICE

v.

J. O. PATTERSON,
as Trustee of the

THE PATTERSON PATENT TRUST, INC.

Defendant.

Patterson Corporation, a corporation organized under the laws of the State of New York, and J. O. Patterson, its president, are the defendants in this case. The complaint alleges that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

The complaint further alleges that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

Also alleged is that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

It is further alleged that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

It is further alleged that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

It is further alleged that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

It is further alleged that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

It is further alleged that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

It is further alleged that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

It is further alleged that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

It is further alleged that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

It is further alleged that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

It is further alleged that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

It is further alleged that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

It is further alleged that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

It is further alleged that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

It is further alleged that the defendants have been engaged in a conspiracy to defraud the plaintiff, and that they have obtained a large sum of money from the plaintiff by means of their fraudulent scheme.

that defendant was to pay additional amounts based upon the number of batteries produced; that defendant should pay taxes and certain other items. Defendant manufactured batteries in plaintiff's factory from October, 1943, until November, 1944, when he vacated the premises.

On July 1, 1945, plaintiff rendered defendant the following statement of account:

| | |
|---|--------------|
| "Balance of account due Nov. 1st, 1944. | \$2022.43 |
| Interest charge to April 1st, 1945. | <u>71.95</u> |
| | 2094.38" |

Defendant received and retained this statement and made no objections to it. In fact, he did not communicate with plaintiff in reference to this statement, and the first notice that it had that defendant objected in any way to the statement was when defendant, in February, 1946, filed his answer to plaintiff's suit. Plaintiff claimed that the statement of July 1, 1945, constituted an account stated between the parties. Defendant contended that it is not an itemized statement and, therefore, that it does not constitute an account stated between the parties, that it was merely a self-serving document, and that the trial court erred in allowing it to be introduced in evidence and in treating it as an account stated. When the statement was offered in evidence the sole objection made to its introduction was that it was not itemized and that "there is no way of checking into it." "To constitute an account stated, the statement rendered must be in a fixed amount, but need not itemize all charges and credits, the bare naming of the amount due being sufficient." (1 C. J. S. Account Stated Sec. 22, pp. 703, 704.) Moreover, the evidence shows conclusively that just before Mr. Martin, the general manager of defendant's business, left the plant, in November, 1944, Mr. Patterson, then president of plaintiff

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and the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation.

SECRET

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ON 06/02 THIS OFFICE RECEIVED THE FOLLOWING INFORMATION:

10th October 1964

James Earl Ray, Jr. is a white male, born in [REDACTED]

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Attorneys for the Plaintiff, Plaintiff's Counsel, and Plaintiff's Agent, are requested to appear at the hearing on the above-captioned matter on the date and at the time and place specified above.

Wolfgang Iser: *Der Akt des Lesens*, 1976, 1984, 1992, 1998, 2001, 2003, 2005, 2007, 2009, 2011, 2013, 2015, 2017, 2019, 2021, 2023, 2025, 2027, 2029, 2031, 2033, 2035, 2037, 2039, 2041, 2043, 2045, 2047, 2049, 2051, 2053, 2055, 2057, 2059, 2061, 2063, 2065, 2067, 2069, 2071, 2073, 2075, 2077, 2079, 2081, 2083, 2085, 2087, 2089, 2091, 2093, 2095, 2097, 2099, 2101, 2103, 2105, 2107, 2109, 2111, 2113, 2115, 2117, 2119, 2121, 2123, 2125, 2127, 2129, 2131, 2133, 2135, 2137, 2139, 2141, 2143, 2145, 2147, 2149, 2151, 2153, 2155, 2157, 2159, 2161, 2163, 2165, 2167, 2169, 2171, 2173, 2175, 2177, 2179, 2181, 2183, 2185, 2187, 2189, 2191, 2193, 2195, 2197, 2199, 2201, 2203, 2205, 2207, 2209, 2211, 2213, 2215, 2217, 2219, 2221, 2223, 2225, 2227, 2229, 2231, 2233, 2235, 2237, 2239, 2241, 2243, 2245, 2247, 2249, 2251, 2253, 2255, 2257, 2259, 2261, 2263, 2265, 2267, 2269, 2271, 2273, 2275, 2277, 2279, 2281, 2283, 2285, 2287, 2289, 2291, 2293, 2295, 2297, 2299, 2301, 2303, 2305, 2307, 2309, 2311, 2313, 2315, 2317, 2319, 2321, 2323, 2325, 2327, 2329, 2331, 2333, 2335, 2337, 2339, 2341, 2343, 2345, 2347, 2349, 2351, 2353, 2355, 2357, 2359, 2361, 2363, 2365, 2367, 2369, 2371, 2373, 2375, 2377, 2379, 2381, 2383, 2385, 2387, 2389, 2391, 2393, 2395, 2397, 2399, 2401, 2403, 2405, 2407, 2409, 2411, 2413, 2415, 2417, 2419, 2421, 2423, 2425, 2427, 2429, 2431, 2433, 2435, 2437, 2439, 2441, 2443, 2445, 2447, 2449, 2451, 2453, 2455, 2457, 2459, 2461, 2463, 2465, 2467, 2469, 2471, 2473, 2475, 2477, 2479, 2481, 2483, 2485, 2487, 2489, 2491, 2493, 2495, 2497, 2499, 2501, 2503, 2505, 2507, 2509, 2511, 2513, 2515, 2517, 2519, 2521, 2523, 2525, 2527, 2529, 2531, 2533, 2535, 2537, 2539, 2541, 2543, 2545, 2547, 2549, 2551, 2553, 2555, 2557, 2559, 2561, 2563, 2565, 2567, 2569, 2571, 2573, 2575, 2577, 2579, 2581, 2583, 2585, 2587, 2589, 2591, 2593, 2595, 2597, 2599, 2601, 2603, 2605, 2607, 2609, 2611, 2613, 2615, 2617, 2619, 2621, 2623, 2625, 2627, 2629, 2631, 2633, 2635, 2637, 2639, 2641, 2643, 2645, 2647, 2649, 2651, 2653, 2655, 2657, 2659, 2661, 2663, 2665, 2667, 2669, 2671, 2673, 2675, 2677, 2679, 2681, 2683, 2685, 2687, 2689, 2691, 2693, 2695, 2697, 2699, 2701, 2703, 2705, 2707, 2709, 2711, 2713, 2715, 2717, 2719, 2721, 2723, 2725, 2727, 2729, 2731, 2733, 2735, 2737, 2739, 2741, 2743, 2745, 2747, 2749, 2751, 2753, 2755, 2757, 2759, 2761, 2763, 2765, 2767, 2769, 2771, 2773, 2775, 2777, 2779, 2781, 2783, 2785, 2787, 2789, 2791, 2793, 2795, 2797, 2799, 2801, 2803, 2805, 2807, 2809, 2811, 2813, 2815, 2817, 2819, 2821, 2823, 2825, 2827, 2829, 2831, 2833, 2835, 2837, 2839, 2841, 2843, 2845, 2847, 2849, 2851, 2853, 2855, 2857, 2859, 2861, 2863, 2865, 2867, 2869, 2871, 2873, 2875, 2877, 2879, 2881, 2883, 2885, 2887, 2889, 2891, 2893, 2895, 2897, 2899, 2901, 2903, 2905, 2907, 2909, 2911, 2913, 2915, 2917, 2919, 2921, 2923, 2925, 2927, 2929, 2931, 2933, 2935, 2937, 2939, 2941, 2943, 2945, 2947, 2949, 2951, 2953, 2955, 2957, 2959, 2961, 2963, 2965, 2967, 2969, 2971, 2973, 2975, 2977, 2979, 2981, 2983, 2985, 2987, 2989, 2991, 2993, 2995, 2997, 2999, 3001, 3003, 3005, 3007, 3009, 3011, 3013, 3015, 3017, 3019, 3021, 3023, 3025, 3027, 3029, 3031, 3033, 3035, 3037, 3039, 3041, 3043, 3045, 3047, 3049, 3051, 3053, 3055, 3057, 3059, 3061, 3063, 3065, 3067, 3069, 3071, 3073, 3075, 3077, 3079, 3081, 3083, 3085, 3087, 3089, 3091, 3093, 3095, 3097, 3099, 3101, 3103, 3105, 3107, 3109, 3111, 3113, 3115, 3117, 3119, 3121, 3123, 3125, 3127, 3129, 3131, 3133, 3135, 3137, 3139, 3141, 3143, 3145, 3147, 3149, 3151, 3153, 3155, 3157, 3159, 3161, 3163, 3165, 3167, 3169, 3171, 3173, 3175, 3177, 3179, 3181, 3183, 3185, 3187, 3189, 3191, 3193, 3195, 3197, 3199, 3201, 3203, 3205, 3207, 3209, 3211, 3213, 3215, 3217, 3219, 3221, 3223, 3225, 3227, 3229, 3231, 3233, 3235, 3237, 3239, 3241, 3243, 3245, 3247, 3249, 3251, 3253, 3255, 3257, 3259, 3261, 3263, 3265, 3267, 3269, 3271, 3273, 3275, 3277, 3279, 3281, 3283, 3285, 3287, 3289, 3291, 3293, 3295, 3297, 3299, 3301, 3303, 3305, 3307, 3309, 3311, 3313, 3315, 3317, 3319, 3321, 3323, 3325, 3327, 3329, 3331, 3333, 3335, 3337, 3339, 3341, 3343, 3345, 3347, 3349, 33

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Other participants in the study included a number of individuals who were

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free domestic life insurance for the first three years of married life.

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the evidence shows conclusively that last before the

the agency's newspaper to reassess its position on the draft and the Vietnam War.

On November 14, 1944, the following individuals were present:

company, handed him an itemized statement of the account between plaintiff and defendant from October 14, 1943, until the time that defendant vacated the premises. This statement showed a balance due plaintiff of \$2,094.38. Patterson testified that the day after Martin left New Philadelphia he discovered that Martin had left upon the desk that he had used in the factory the statement, and that he, Patterson, then mailed the statement to defendant. Martin, called ~~by defendant~~ as a witness, did not deny the receipt of the itemized statement, nor did defendant deny that he received it. We hold that the trial court was justified in treating the statement of July 1, 1945, as an account stated between the parties. An account stated is deemed conclusive both at law and in equity unless impeached for fraud or mistake. (1 C. J. S. Account Stated Sec. 48, p. 728; Pure Torpedo Corp. v. Nation, 327 Ill. App. 28, 33.) The itemized statement of account between the parties shows that on July 7, 1944, there was a balance due plaintiff of \$2,398.34. At that time there was a dispute between defendant and Patterson as to the correctness of the account. Patterson told defendant that he needed money to make a payment upon a home that he had bought and he urged defendant to give him a check. Defendant testified that Patterson told him that he was remodeling his home and needed money badly, and that he said to Patterson: "Well, I intend to be down there again in the next couple of weeks at which time I will discuss it, discuss the matter again with you, but I do not intend to pay the charges, the invoices that you have presented me with * * *." "I told him that I thought I would be very lenient and that I would send him \$1500 in full for his settlement and he assured me and said that that was perfectly satisfactory and I embodied that on my check. * * * this is the check that I mailed that night * * * to him." Patterson admits receiving the check and

using it. The face of the check reads as follows:

"Harvard, Ill. 7-5 1944. No. _____

"70-508 THE HARVARD STATE BANK 70-508

"Pay to the
Order of Patterson Mfg. Co. \$1500⁰⁰/xx

"Fifteen Hundred - - - - - Dollars

"L O Stewart"

On the back of the check appears the following: "This is full payment for all obligations including July rent." Patterson admitted that when he received the check he noticed that indorsement on its back. The contention of defendant that the acceptance by plaintiff of the check of July 5, 1944, constituted a full settlement of all matters between the parties at that time, is a meritorious one. That there was a mistake in the statement of account plaintiff rendered defendant on July 1, 1945, appears from the testimony offered by plaintiff. The itemized statement of account shows that at the time plaintiff received the check for \$1,500 there was a balance then due plaintiff of \$2,398.34; that plaintiff credited defendant with the amount of the check but retained in the account as a balance then due from defendant \$898.34, the difference between \$2,398.34 and \$1,500, and this \$898.34 forms a part of the \$2,094.38 balance shown by the statement of account of July 1, 1945. To avoid the effect of the plain mistake in the account plaintiff advances the following argument: That accord and satisfaction is an affirmative defense and defendant, to take advantage of it, should have set it up in his answer or reply; that he failed to do so and, therefore, he cannot urge that defense. It would be highly inequitable to sustain this position of plaintiff. The evidence of both plaintiff and defendant bears upon the defense of accord and satisfaction. Defendant, to support his claim of accord and satisfaction, introduced

4. $\frac{1}{2} \pi$ is a solution of $\tan x = 1$ and $\frac{1}{2} \pi$ is a solution of $\sin x = 1$.

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Payment for: [REDACTED] [REDACTED]

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 01-11-2001 BY 60322

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and in a few cases, the results are not statistically significant.

FORM NO. 10 (REVISED 1-1-64)

There is no doubt that the Government is doing its best to protect the public interest in this case.

—Enoch was identified after a search was made, and he was notified.

6-10-1960, 10:00 AM. The first of the series of tests was conducted in the

be reported, notwithstanding the fact that the same is not required of the

the check and plaintiff interposed ^{no objection} to its introduction. The trial court, in his opinion, stated: " * * * the defendant claims payment of whatever account the plaintiff had against the defendant by the payment of this check of \$1500.00 which is dated July 5, 1944." The position now taken by plaintiff was not made nor suggested during the trial of the case. Had the present objection been made during the trial, defendant would have had an opportunity to amend his pleadings if his counsel deemed it necessary to make any correction. Plaintiff, during the trial, proceeded upon the assumption that defendant had the right to make the defense of accord and satisfaction, and the present position of plaintiff is an afterthought. Simple justice requires that \$898.34 should be deducted from the amount that the trial court found to be due plaintiff.

Defendant's counterclaim alleges:

"1. Defendant alleges that after the said agreement of October 19, 1943 was executed by plaintiff and defendant, at the request of the plaintiff, he made three trips to Washington, D. C. on the behalf of plaintiff, with the agreement that his expenses for said trip would be paid by plaintiff; that his expenses for the said three trips was \$300, which plaintiff has failed and refused to pay.

"2. Defendant further alleges that on or about November 20, 1944 he sold and delivered to plaintiff a pasting machine having a value of \$1300.00 which plaintiff accepted and for which it agreed to pay, but that plaintiff has refused and failed to pay defendant for said pasting machine.

"3. Defendant further alleges that on or about November 20, 1944 at the request of plaintiff, he had a generator belonging to plaintiff rewound at a cost of \$375.00, which he paid, and for which plaintiff has failed and refused to reimburse him.

"4. Defendant further alleges that, after the termination of said contract, he had certain merchandise of a value of \$476.84 in the premises owned by plaintiff and which, at the request of plaintiff, he allowed to remain in plaintiff's possession. Plaintiff has failed and refused to reimburse defendant for this merchandise."

The answer of plaintiff to the counterclaim denies that it requested defendant to make any trips to Washington and states that if any such trips were made they were made in regard to defendant's own business; states that the pasting machine was never sold and delivered to plaintiff and denies that it ever agreed to pay for the same or ever agreed to buy the same; denies that it is liable for the payment of \$375 for the generator, but states the fact to be that said generator had been used by defendant for a considerable length of time and it was burned out due to defendant's negligence; states that in accordance with the contract between the parties defendant was to maintain all equipment at his own expense; denies that it retained defendant's merchandise on its premises at the request of plaintiff and states the fact to be that the only merchandise left on the premises were certain vent caps which were of no value to plaintiff and that defendant had the right "to pick same up." In his counterclaim defendant sought to recover from plaintiff under allegations of express agreements or specific requests. In this court, however, he urges that he should be permitted to recover upon a different theory, viz: "Defendant's theory of his counterclaim is that the charges therein were made with the knowledge and consent of plaintiff and were necessary to the operation of the business." In his opinion the trial court stated:

"Defendant filed a counter claim claiming that for

expenses paid out on trips to Washington, costs of repairing of the generator, the price paid for the pasting machine, and also for merchandise left on the premises when he vacated the premises.

"Number one, so far as the material left on the premises, which amounted to \$475.73, to be exact, by the evidence, it was his property and he could, and it was almost his duty to, take it out of there, and not having done so, that will be eliminated from this counter claim.

"In connection with the generator and the pasting machine, from his own testimony, he testified that there was no agreement on the part of Mr. Patterson to maintain and repair the machine.

"The machines were repaired by him on his own initiative and for his own benefit. There being no understanding as to the maintenance or repair of the machines, so the machine is out and so is the generator."

The trial court stated that in making his findings he passed upon the credibility of the witnesses. We are in full accord with his findings as to the counterclaim save as to one item. He allowed defendant \$150 on account of the expenses he incurred in making his trips to Washington. In making this allowance the court stated: "Trips to Washington: I think they both, in my judgment, profited by that, because if he did go to Washington, even without the consent or permission of Mr. Patterson, still he went there and spent \$300.00 and out of which Mr. Patterson, indirectly, got some benefit because the more batteries that he was able to produce and sell, the more commission Mr. Patterson was to get, would get. So, for that reason, I am allowing him \$150.00 on that." We think the evidence of defendant shows that he never got any authority from Patterson to make the trips to Washington and to spend the money in connection

expressed out of the... of the... and also for... the premises.

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... the more... that he was... Patterson was to get... I am allowing him... on that... the evidence of... and shows that he never... from Patterson to make the trip to Washington and to spend the money in connection

with the trips. However, plaintiff has not appealed from the judgment entered upon the counterclaim and it is therefore in no position to complain of the court's action in allowing defendant \$150 upon the counterclaim.

That part of the judgment of the Municipal Court of Chicago wherein the court found the issues against defendant and fixed plaintiff's damages in the sum of \$2,022.43 is reversed, and the cause as to that part of the judgment is remanded with directions to the trial court to enter judgment for plaintiff and against defendant in the sum of \$1,196.04. That part of the judgment entered upon the counterclaim is affirmed.

THAT PART OF JUDGMENT FIXING
PLAINTIFF'S DAMAGES REVERSED
AND REMANDED WITH DIRECTIONS.
THAT PART OF JUDGMENT ENTERED
UPON THE COUNTERCLAIM AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

with the trip. However, it is not agreed from the
judgment entered upon the case that it is therefore in
no position to complain of its action in allowing defend-
ant and GPO upon its counterclaim.

That part of the judgment of the Municipal Court of
Chicago wherein it is found that the defendant is liable
and fixed liability is reversed, and its reversal
and the cause is to be set aside and a new trial with
directions to the trial court to take evidence for plaintiff and
against defendant is entered. That part of the
judgment entered upon the case is reversed.

IT IS ORDERED that the
judgment of the Municipal Court of
Chicago be reversed and the cause
be set aside and a new trial
be granted with directions to the
trial court to take evidence for
plaintiff and against defendant.

WITNESSED my hand and seal of office at Chicago, Illinois, this 10th day of June, 1934.

44064

ODILE AUBRY,

Appellant,

v.

SUPREME LIBERTY LIFE INSURANCE COMPANY, a corporation, and EARL B. DICKERSON, Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

332 1.1. 656

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

From a judgment order dismissing her complaint upon motion of defendants plaintiff appealed to the Supreme court upon the assumption that a freehold was necessarily involved in the case and that, "irrespective of whether a freehold be involved, a constitutional question is presented." The Supreme court (Aubry v. Supreme Life Ins. Co., 395 Ill. 584) held that neither a freehold nor a constitutional question was involved, and transferred the cause to this court.

The complaint alleges:

"Now comes plaintiff, Odile Aubry, by her attorney, John H. Roser, and complains of Supreme Liberty Life Insurance Company, a corporation, organized under the laws of Illinois, and Earl B. Dickerson, defendants, in action of fraud upon a contract of rental of premises at 1714 Maypole Avenue, Chicago, Illinois.

"1. Plaintiff alleges that during the years 1932 to 1937, she was the owner in fee simple of the premises legally described as: The East Half (1/2) of Lot Nine (9) in Page and Woods Subdivision of Block 5, in Canal Trustees Subdivision of Section 7, Township 39 North, Range 14, East of the Third Principal Meridian, in Cook County, Illinois, otherwise known as 1714 Maypole Avenue, Chicago, Ill.

"2. That the said corporation occupied said premises from July 15, 1933 to July 15, 1937; and plaintiff alleges, upon

information and belief, that the said corporation, Supreme Liberty Life Insurance Company, paid the sum of \$20.00 per month as rental for said premises; that the said tenancy of said premises by the said corporation was arranged through the said defendant, Earl B. Dickerson; that no authority or permission was given the said Earl B. Dickerson, or any one else, to act on behalf of this plaintiff; and that no rental for the said premises was ever received by the said plaintiff, nor was there a proper accounting ever made.

"3. That the said Earl B. Dickerson was attorney for the late Numa G. Aubry, the husband of plaintiff, now deceased, for many years, and had unlimited knowledge of the affairs of the said Numa G. Aubry.

"4. That plaintiff was forced to move from said premises, without notice, and that furniture and furnishings were placed in a warehouse at 46th Street and Cottage Grove Avenue, without plaintiff's knowledge or permission, being taken out of plaintiff's flat without writ of restitution.

"5. That a foreclosure suit was filed, the details of which are as follows: No. 35 S 14938, in Superior Court of Cook County, by Earl B. Dickerson; that contrary to the rules of ethics and all well-established customs, the said Earl B. Dickerson acted adverse to the interests of plaintiff, who was his client, having intimate knowledge of and having given advice to her in the same matters, and acting against her in the foreclosure of the same premises, having also acted for and in behalf of said corporation on the matter of the first and second mortgage of said premises in foreclosure suit.

"6. That the said Dickerson also acted for her with reference to certain Maywood property owned by said plaintiff and her said husband in joint tenancy, the legal description of

information is not to be used for any purpose other than

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which is as follows: Lots 21 and 22 in the Subdivision of the North 1/2 of the East 1/2 of Block 19 and the North 1/2 of Block 2 in Smith's Addition to Maywood in Section 10, Township 39 North, Range 12 East of the Third Principal Meridian, in Cook County, Illinois.

"7. That the said defendant, Supreme Liberty Life Insurance Company, a corporation, occupied the first floor front, and in said matter of lease Earl B. Dickerson looked after and represented the interests of said corporation, instead of the interests of this plaintiff.

"8. That the said corporation never paid her any rent for the use and occupation of said premises, at 1714 Maypole Avenue, and neither was any or proper accounting made for same, according to the best knowledge and information of plaintiff.

"9. That the said corporation made representations to various other persons that it was paying rent to her.

"10. That the said plaintiff alleges, upon her best information and belief, that receipts for the rental of the premises at 1714 Maypole Avenue, Chicago, Illinois, were exhibited to various persons by the various other tenants, whereas the said insurance company had no receipts to exhibit for the purported payments of its rental of the said premises; and never did show any receipts for the rental of said premises.

"11. That at no time did plaintiff receive any rental, which amounts to \$960.00, and plaintiff claims said sum, with interest at 5% per annum from July 15, 1933 to July 15, 1937 and from then to the present time, as provided by statute.

"12. Plaintiff alleges fraud and collusion by her attorney, and confidential adviser in the same matters, in that he, the said Dickerson, filed suit and proceeded against her despite his fiduciary relations of attorney and client, and in

which is a full and complete record of the
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2 in Smith's Addition, Township 1, Range 33 North,
Range 12 East of the 1st Meridian, in Cook County,
Illinois.

"I, the undersigned, being a duly qualified
surveyor for Cook County, Illinois, do hereby
and do certify that the above described land is
represented the land of the State of Illinois, in
interest of the State of Illinois.

"I, the undersigned, being a duly qualified
surveyor for Cook County, Illinois, do hereby
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"I, the undersigned, being a duly qualified
attorney, and being acting as such in the same matters, in that
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despite his fiduciary relations of attorney and client, and in

final decree of foreclosure in said suit in Superior Court, said corporation being represented by plaintiff's attorney, never having made a proper accounting of said rental due from defendant corporation, and said plaintiff, after a thorough investigation has just discovered said fraud, and

"Plaintiff, therefore, claims the sum of \$960.00. and interest from July 15, 1933 to the date of these presents,

"To the damage of the plaintiff in the sum of \$5,000.00.

"Wherefore she brings this suit."

Defendants filed the following motion to dismiss the complaint:

"Supreme Liberty Life Insurance Company, a corporation and Earl B. Dickerson, defendants in the above entitled action, by Earl B. Dickerson and Nelson M. Willis, their Attorneys, move to dismiss the complaint herein on the ground that the complaint herein is substantially insufficient in law in the following particulars:

"1. That it appears on the face of the Complaint that the action is on an alleged oral obligation for rents allegedly to be due plaintiff; that although in paragraph 2 the complaint states that Supreme Liberty Life Insurance Company, upon information and belief, paid the sum of \$20.00 per month as rental for said premises, there is no allegation stating to whom said rent was paid; that therefore there is no duty on the part of the defendants, or either of them, to account to the Plaintiff for such sums alleged to have been paid by said Defendants, a Corporation, The Supreme Liberty Life Insurance Company.

"2. The Complaint charges fraud upon the contract for rental of premises at 1714 Maypole Avenue, Chicago, Illinois, but sets forth no facts on which to base said fraud; nor sets up any contract whatsoever.

"3. That the cause of action alleged in the Complaint did not accrue within the time limited for commencement action thereon, to-wit: The Complaint sues in paragraph (11) thereof for \$960.00 with interest at five per cent per annum from July 15, 1933 to July 15, 1937. The cause of action, if any, accrued not later than July 15, 1937, which is more than five years prior to the time said complaint was filed herein.

"4. That the fact that the cause of action did not accrue within the time limited by law for the commencement of an action thereon appears on the face of the complaint herein.

"5. That in paragraphs 5, 6 and 12 of the Complaint, the plaintiff charges Earl B. Dickerson, an Attorney at Law at the Chicago Bar with fraud and collusion as Attorney for the Defendant, Supreme Liberty Life Insurance Company, and particularly sets forth that such fraud and collusion was perpetrated on the plaintiff in foreclosure proceedings entitled 35 S 14938, Superior Court of Cook County Illinois and that such fraud arising in connection with said cause, was just discovered. If such fraud affected the result of the decree arising in said cause, plaintiff should file a proceeding in the original cause of action to have said decree set aside.

"6. That the Complaint shows that the Defendant, Supreme Liberty Life Insurance Company filed foreclosure proceedings against the plaintiff in case number 35 S 14938, Superior Court of Cook County Illinois; that said cause of action is barred by a prior judgment in favor of Supreme Liberty Life Insurance Company and against the Plaintiff, Odile Aubry in said Court; wherein the Court entered a decree of foreclosure authorizing the sale of the said premises at 1714 Maypole Avenue, Chicago, Illinois at public auction and wherein pursuant to said decree said Supreme Liberty Life Insurance Company thereafter bid in said premises, and wherein

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it further appears that during the pendency of the said foreclosure proceedings, the Court appointed a receiver to collect the rents and profits occurring [accruing] from time to time from said premises."

The trial court sustained the motion to dismiss, "and leave of plaintiff to amend said complaint is hereby denied," and the cause of action was dismissed at plaintiff's costs.

The main contention of plaintiff is that "the Court exceeded its discretion in denying plaintiff's motion to file amended complaint"; that "the lower court should have at least given the appellant one more opportunity to amend her complaint instead of summarily dismissing the case." Defendants, one of them a lawyer, make no answer to this contention. They state that while there are general allegations of fraud and collusion in the complaint, no facts are alleged that would sustain the charges; that the gist of the action is that defendant Supreme Liberty Life Insurance Company owes appellant rent and that it appears from the face of the complaint that the statute of limitations stands as a bar to plaintiff's suit. Plaintiff contends that defendant Dickerson was the attorney and confidential adviser of plaintiff and her husband and that under the facts and circumstances of the case defendants will not be able to successfully interpose the statute of limitations as a defense to her action. In this connection, it must be noted that the drafter of the complaint attempted to allege that defendant corporation represented that it was paying rents to plaintiff for the premises in question but that in fact it paid the rents to defendant Dickerson and that the latter has failed to account to plaintiff for the said rents. The Illinois Practice Act is extremely liberal in allowing amendments to pleadings, and we take cognizance of the fact that the complaint, upon its face, shows that it was drafted by an attorney

-7-

unskilled in the art of pleading. We are forced to the conclusion that the trial court erred in denying plaintiff leave to amend her complaint. By anything said in this opinion we have not intended to intimate that defendants were guilty of any fraud or improper practices in their dealings with plaintiff and her husband.

The judgment order of the Superior court of Cook county is reversed and the cause is remanded with directions to the trial court to allow plaintiff to file an amended complaint.

JUDGMENT ORDER REVERSED AND
CAUSE REMANDED WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.

-7-

unwilling in the first place. He was forced to the con-
clusion that the trial was a farce and that the plaintiff's leave
to amend was completely refused. In this opinion we
have not the slightest doubt that the defendant was guilty of
any kind of fraud or deception in his dealings with the
plaintiff and his estate.

The judgment of the Superior Court of Cook
County is reversed and the case is remanded with directions
to the trial court to allow the plaintiff to amend his
complaint.

IT IS SO ORDERED.
JAMES H. HARRIS, JUDGE.

Friend, J. H. Harris, Judge.

44090

THADDEUS OSADA,
Appellant,
v.
PATENT SCAFFOLDING CO.,
Appellee.

313
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

3321A. 856²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Thaddeus Osada sued Patent Scaffolding Co. to recover for personal injuries sustained by him. To the amended complaint defendant filed an answer which set up, inter alia, a special defense and plaintiff's motion "to strike the special plea of the defendant" was overruled. Plaintiff elected to stand upon his motion and judgment was entered against him for costs. He appeals from that judgment.

Count I of plaintiff's amended complaint alleges:

"1. That the defendant, the Patent Scaffolding Co., Inc., a foreign corporation, doing business in the State of Illinois, on and before to wit: October 22, 1945, was engaged in the manufacture, building, constructing, distributing and leasing and renting of scaffolding, ladders, supports and certain planks or platforms referred to in the trade as 'kick planks' or holding itself out to or represented itself to the public as the manufacturer or builder of the said scaffolding, ladders, supports and 'kick planks'; that the legend or word 'patent' was engraved or affixed to each component part or section of the scaffolding, ladders, supports and 'kick planks' so manufactured and distributed by the said defendant; that during the regular course and conduct of its business, the defendant leased or rented its scaffolding, ladders, supports and 'kick planks' for hire and award to divers and various persons.

"2. That sometime prior to October 22, 1945, to wit: six weeks, the defendant leased or rented certain scaffolding,

STATEMENT OF THE
COMMISSIONER OF THE
REVENUE DEPARTMENT

DATE: 10/10/1964

*BUDGETARY TO THE FISCAL YEAR 1967-68 LARGELY EXHAUSTED. REF

recovery of 100 million dollars from these arrears.

appeals from that district.

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Illinois, on the basis of the following:

in the letter, dated 1960, from the author to the undersigned.

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planks or slabs as shown in the photo as 'float' slabs' or

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Manufactured or altered of the said and sold to the said

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and was not a member of the same.

conduct of its business, the defendant leased or rented its

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that some of the evidence is dated October 22, 1941, and that

During the six weeks, the defendant leased or rented certain scaffolding,

ladders, supports and 'kick planks' to the General Building & Maintenance Co., a corporation, general painting contractors located in the City of Chicago, County of Cook and State of Illinois, for use by them in the performance of certain painting contracts or work in the City of Chicago, County of Cook and State of Illinois.

"3. That the plaintiff on to wit: October 22, 1945, was employed by the General Building & Maintenance Co., a corporation, in the capacity of a painter to work on the premises located at 4711 West Madison Street, Chicago, Illinois; that the plaintiff was required to use the said scaffolding, supports, ladders and 'kick plank' in the performance of his duties as such painter in the regular course of his employment; that at the time and place aforesaid and at the time and place of the happening of the occurrence hereinafter mentioned, the defendant had no employees, agents or servants engaged in any employment whatsoever nor did the defendant have any duty or obligation to have any agents, servants or employees at the time and place in question.

"4. That it was the duty of the said defendant in the exercise of ordinary care to use material and lumber of strength and quality for the said scaffolding, ladders, supports and 'kick plank' that would securely and safely sustain and support persons rightfully standing, walking and using the said scaffolding, ladders, supports and 'kick plank', but the defendant, not regarding its duty in that behalf, negligently, carelessly and wrongfully manufactured and constructed the said 'kick plank' of material and lumber of such poor, weak, inferior and old quality that the said 'kick plank' would not and did not safely and securely hold up and support and sustain persons rightfully standing and walking on the said 'kick plank' as aforesaid and the said 'kick plank' remained in the said weak and defective condition until the occurrence and

State of Illinois.

contracts or work in the City of Chicago, County of Cook and Illinois, for use by them in the performance of certain painting located in the City of Chicago, County of Cook and State of Maintenance Co., a corporation, General painting contractors ladders, supports and 'kick planes' to the General Building &

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was employed by the General Electric Corporation as a corporation, in the capacity of a worker on the premises located at 4711 West Edison Street, Chicago, Illinois; that the plaintiff was required to use the said tools, equipment, materials and 'black' in the performance of his duties as such worker in the regular course of his employment; and that the said plaintiff was at the time and place of the accident engaged in work on the said machine, and hence hereinbefore mentioned, the defendant had no employees, agents or servants engaged in any way upon or about the said machine and have any duty or obligation to leave it in a safe condition at the time and place in question.

in the said weak and defective condition until the occurrence and said 'kick plank' as aforesaid and the said 'kick plank' remained support and sustain persons rightfully standing and walking on the 'kick plank' would not and did not solely and assembly hold up and lumber of such poor, weak, inferior and of quality that the said manufactured and constructed the said 'kick plank' of material and ing its duty in that behalf, rightfully, lawfully and lawfully ladders, supports and which plank, but the defendant, not a yard- rightfully standing, walking and using the said plank.

the injury herein complained of, without the knowledge of the plaintiff.

"5. That while the plaintiff was walking or standing on the said 'kick plank' as aforesaid on to wit: October 22, 1945, in the course of his duties and employment and was at the time and immediately before and at all times herein and hereinafter averred, in the exercise of due care for his own safety and the safety of others, the said 'kick plank' by reason of the said negligence and carelessness of the defendant as aforesaid, then and there broke, shattered and separated and as a direct result thereof, the plaintiff fell and was precipitated and thrown to the floor or ground from a distance of to wit: 18 to 22 feet * * *."

The count then alleges that by reason of the said fall and negligence of defendant plaintiff sustained serious injuries, and he asks for judgment against defendant in the sum of \$75,000. Count 2 makes paragraphs 1 to 3, inclusive, of count I a part of count 2, and also alleges:

"4. That it was the duty of the defendant in the exercise of ordinary care to properly inspect and test the said scaffolding, ladders, supports and 'kick plank' prior to its leasing and renting to the General Building & Maintenance Co. so as to ascertain and determine whether the said supports, ladders, scaffolding and 'kick plank' would safely and securely sustain, support and hold while persons were standing, walking or working thereupon; that notwithstanding their duty in that regard, the defendant failed to properly inspect or test the said 'kick plank' and that the said 'kick plank' was defective, insufficient, imperfect and inadequate and would not securely and safely support persons rightfully upon them and that said 'kick plank' remained in said defective condition without the plaintiff's knowledge

the injury herein complained of, without the knowledge of the plaintiff.

"2. That while the plaintiff was walking on standing

on the said 'kick plank' as aforesaid on to with: October 22, 1942, in the course of his duties and employment and was at the time and immediately before and at all times herein and hereinafter averred, in the exercise of due care for his own safety and the safety of others, the said 'kick plank' by reason of the said negligence and carelessness of the defendant as aforesaid, then and there broke, shattered and separated and as a direct result thereof, the plaintiff fell and was precipitated and thrown to the floor or ground from a distance of to wit: 15 to 20 feet

The court then alleges that by reason of the said fall and negligence of defendant plaintiff sustained serious injuries, and he seeks for judgment against defendant in the sum of \$25,000. Count 2 alleges paragraphs 1 to 3, inclusive, of count 1 a part of count 2, and also alleges:

"4. That it was the duty of the defendant in the exer-

cise of ordinary care to properly inspect and test the said scaffolding, ladders, supports and 'kick plank' prior to its leasing and renting to the General Building & Maintenance Co., so as to ascertain and determine whether the said supports, ladders, scaffolding and 'kick plank' would safely and securely sustain, support and hold while persons were standing, walking or working thereon; that notwithstanding their duty in that regard said defendant failed to properly inspect or test the said at the said time and that the said 'kick plank' was defective, insecurely held up and perfect and inadequate and would not sustain and walking on the persons rightfully upon them and that said 'kick plank' remained in said defective condition without the plaintiff the occurrence and

until the happening and occurrence and injury herein complained of; that the defendant knew of such defective condition of the said 'kick plank' or could or should have known of such defective condition by the exercise of reasonable care in properly inspecting and testing the said 'kick plank' prior to its use by persons rightfully using it under the lease or rental as aforesaid."

The count further alleges that while plaintiff was walking or standing on said "kick plank" in the course of his duty and employment and was in the exercise of due care for his own safety said "kick plank," by reason of the said defects and failure on the part of defendant to properly inspect and test it, gave way and fell, and that as a direct result of same plaintiff was injured.

Defendant's amended answer to the amended complaint sets up, in addition to other defenses, the following special defense:

"This defendant further states that the plaintiff ought not to have this aforesaid action against this defendant because at the time mentioned in plaintiff's amended complaint the said plaintiff and his employer, General Building and Maintenance Company, a corporation, and this defendant and its agents and servants, were subject to and were operating under and in pursuance of the Workmen's Compensation Act of the State of Illinois; that both of said employers at said time had on file with the Industrial Commission of the State of Illinois their election to be bound by said Act; and the said plaintiff at the time and place aforementioned was working and acting within the scope of his employment with his employer, the General Building and Maintenance Company, a corporation; that by virtue of Section 29 of the Workmen's Compensation Act of the State of Illinois, plaintiff's employer, to-wit, General Building and Maintenance Company, a corporation, was subrogated to the cause of action, if any, arising from the supposed

grievances mentioned in the amended complaint, and, if any cause of action exists against this defendant for said alleged grievances mentioned in the amended complaint, the right to bring such cause of action is in the plaintiff's employer, to-wit, the General Building and Maintenance Company, a corporation, and not in the plaintiff, and the plaintiff, by virtue of said Section 29 of the Workmen's Compensation Act of the State of Illinois herein referred to, is barred from bringing this action against this defendant."

It is conceded that the action of the trial court in overruling plaintiff's motion to strike the special defense was based upon the theory that under the facts set up in the special defense interposed in defendant's amended answer plaintiff's common law right to recover against defendant was transferred to his employer by operation of the statute (sec. 29 of the Workmen's Compensation Act, chap. 48, par. 166, Ill. Rev. Stat. 1945). The relevant part of section 29 reads as follows:

"Where an injury or death for which compensation is payable by the employer under this Act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this Act, or being bound thereby under section three (3) of this Act, then the right of the employee or personal representative to recover against such other person shall be transferred to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this Act, by reason of the injury or death of such employee."

Plaintiff practically concedes that if the special defense interposed is to be tested solely by "the letter of the statute"

grievances mentioned in the former complaint, and, in any case of action exists against this defendant for said alleged grievance mentioned in the amended complaint, the right to bring such cause of action is in the plaintiff's complaint, to-wit, the General Building and Loan Company, a corporation, and not in the plaintiff, and the plaintiff, in virtue of said section 29 of the Workmen's Compensation Act of 1913, herein referred to, is barred from bringing such action against this defendant.

It is conceded that the action of the plaintiff is barred in every case by the provisions of said section 29 of the Workmen's Compensation Act of 1913, and that the plaintiff is barred from bringing such action against this defendant in the event of a recovery by the plaintiff from the defendant by operation of the Workmen's Compensation Act, chap. 54, § 29, of the Laws of 1913. The relevant part of section 29 reads as follows:

"Where an employee is injured or disabled while engaged in his employment by the negligence of his employer or of any officer, and was caused under circumstances which render him liable for damages in some person other than the employer or officer, such other person having also elected to be liable for the injury or damage thereby under section 29 of the Act, the right of the employee or personal representative to recover damages from such other person shall be transferred to the employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this act, by reason of the injury or death of such employee."

Plaintiff practically concedes that if the special defense interposed is to be tested solely by "the letter of the statute"

it sets up a good defense to plaintiff's action, but he contends that the special defense must also be tested by the allegations in the complaint that the injuries to plaintiff were inflicted "by defective products, instrumentalities and pieces of equipment after the latter had left the hands of the wrongdoer and his employees," and that "the defendant had no employees, agents or servants engaged in any employment whatsoever nor did the defendant have any duty or obligation to have any agents, servants or employees at the time and place in question," and also by "the object, spirit and intention of the statute," and that when so tested the special defense interposed does not come within the spirit of section 29 and therefore that section is not a bar to plaintiff's action. In an effort to sustain this position counsel for plaintiff read into the statute language that, in our opinion, amounts to a proviso that would materially change the plain language and purpose of the statute. As stated in Illinois Publishing Co. v. Indus. Com., 299 Ill. 189, 196: "In making this act a part of the law of this State the legislature has used plain language, and if it did not mean what it said, then it, and not this court, must change the language." As we view this appeal, the question as to whether the action of the trial court in sustaining the special defense was warranted is settled by a number of decisions of our Supreme court. We need only refer to a late decision of that court, Thornton v. Herman, 380 Ill. 341, wherein the court states (pp. 343, 344, 345):

"Section 29 deals with the right of an injured employee to maintain an action against a third party whose negligence caused the injury. The pertinent parts are: 'Where an injury or death for which compensation is payable by the employer under this act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal

liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this act, or being bound thereby under section 3 of this act, then the right of the employee or personal representative to recover against such other person shall be transferred to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this act, by reason of the injury or death of such employee.'

"The second paragraph of section 29 makes provision for prosecuting an action against the negligent third person where such third person has elected 'not to be bound by this act.' Under such circumstances, the injured employee may prosecute an action for damages against such negligent third party. Further provision is made for reimbursing the employer of the injured employee for any amount that he has been required to pay as compensation under the act.

"Section 29 divides negligent third parties into two classes, namely: those that are bound by the act and those that are not. It is definitely settled by the various cases in which section 29 has been construed that an injured employee can not maintain a cause of action against a negligent third-party employer who is bound by the act. (Keeran v. Peoria, Bloomington and Champaign Traction Co., 277 Ill. 413; O'Brien v. Chicago City Railway Co. supra [305 Ill. 244].) The cause of action which the injured employee has is by operation of the statute transferred to his employer and he is limited in his right of recovery to the amount of the award for which he has become liable.

"The many cases where section 29 has been construed were analyzed in O'Brien v. Chicago City Railway Co. supra, and a summary of the holdings of the several cases is stated in the

[illegible]

following language: 'From these cases it appears that we have held (1) that the common law right of action of an employee against his employer for negligently injuring him in the course of his employment is abolished; (2) that the common law right of action of an employee against any other person than his employer for negligently injuring him in the course of his employment where such other person is bound by the provisions of the Workmen's Compensation act is abolished; (3) that the common law right of action of an employee against any other person than his employer for negligently injuring him in the course of his employment where such other person is not bound by the provisions of the Workmen's Compensation act is not affected by the act but is preserved in its full extent to the employee; (4) while the right of action against the person negligently causing an injury who is not bound by the provisions of the act is unaffected by it, the employer who is free from negligence is entitled to indemnification from the proceeds of such cause of action for the compensation he is bound to pay, and the cause of action may be prosecuted in the name of either the employer or the employee, but in either case is for the benefit of both, in accordance with their respective rights; (5) that in cases of negligent injury caused by a person not bound by the act, the injured employee is not put to his election between compensation under the statute and damages at common law but may prosecute the common law action and the statutory claim for compensation at the same time.'" (Italics ours.)

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

Following language: "notwithstanding that we have held (1) that the common law principle of an employee against his employer for injury to his person or property in the course of his employment is not subject to the right of an employer to limit his liability by contract, and (2) that the common law principle of an employer's liability for negligence is not subject to the right of an employer to limit his liability by contract, the right of an employer to limit his liability by contract is not binding against the common law principle of an employer's liability for injury to his person or property in the course of his employment, and (3) that the common law principle of an employer's liability for negligence is not subject to the right of an employer to limit his liability by contract." The right of an employer to limit his liability by contract is not binding against the common law principle of an employer's liability for injury to his person or property in the course of his employment, and (3) that the common law principle of an employer's liability for negligence is not subject to the right of an employer to limit his liability by contract.

affirmed.

Friend, P. J., and ...

44104

3321.A. 657¹

A

MORRIS INVESTMENT COMPANY,
a corporation,

Appellant,

v.

DAYTON BALLIS d/b/a DAYTON
CURRENCY EXCHANGE, M. DENT
and DON SIMS,

Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

314

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Morris Investment Company, a corporation, sued Dayton Ballis, doing business as Dayton Currency Exchange, and Central National Bank, a corporation. The statement of claim alleges that on July 6, 1945, and August 2, 1945, defendant Ballis, at the instance of M. Dent, issued two money orders, No. 65540 and No. 68107, for \$47.50 each; that the money orders were drawn on Central National Bank, a corporation, defendant, and for good and valuable consideration said orders were delivered to plaintiff and became its property; that on or about September 14, 1945, defendant Ballis wrongfully stopped payment on said money orders. Plaintiff asked for judgment for \$95. Central National Bank was dismissed from the cause. Defendant Dayton Ballis, doing business as Dayton Currency Exchange, filed an appearance and also caused to be issued a third party notice to Don W. Simms and E. Dent, which notified them of the claim of plaintiff against defendant and that the said two money orders have been presented by plaintiff to defendant for payment and they bear the true indorsement of Morris Investment Company, and that "you have agreed to reimburse the Dayton Currency Exchange upon this contingency happening by virtue of your affidavit of September 10, 1945. And take notice that if you wish to dispute the claim of the plaintiff * * * as against the defendant, or your liability to the defendant, you must either appear in person before the Municipal Court of Chicago * * *

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To the President of the United States

The following information was obtained from the files of the Department of State:

Investment in the United States is a key factor in the economic growth of the country. The United States is a major source of capital for the world, and its investment in other countries is a major factor in the economic growth of those countries. The United States is a major source of capital for the world, and its investment in other countries is a major factor in the economic growth of those countries.

of your letter of 10/10/50 is hereby acknowledged.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the results of its investigation into the activities of the British Security Organisation in the United States.

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and file your appearance in writing with the clerk of said Court, or cause your appearance in writing, by yourselves or attorney, to be entered in said action at or before that time * * *. In default of so appearing you will be deemed to admit the validity of any judgment obtained against the defendant in said action and your own liability to contribute or indemnify to the extent herein claimed which may be enforced against you pursuant to the rules of the Court." Don W. Sims filed a defense to the third party notice, in which he denies that the defendants Dayton Ballis d/b/a Dayton Currency Exchange and Central National Bank, a corporation, are entitled to the sum of \$95.00 from him, but admits that he agreed to reimburse the Dayton Currency Exchange in the event that it was compelled to pay the proceeds of said money orders mentioned in plaintiff's statement of claim, and denies that Dayton Ballis, doing business as Dayton Currency Exchange, has been compelled to pay plaintiff the proceeds of said money orders. Dent filed an amended counterclaim against plaintiff in which he asked for damages for his wrongful eviction by plaintiff from certain premises belonging to plaintiff. The trial court tried and determined the claim of plaintiff against Dayton Ballis, doing business as Dayton Currency Exchange (hereinafter called defendant), and entered an order transferring the counterclaim of Dent against plaintiff and the claim of defendant against Dent to the chief justice for reassignment. The claim of plaintiff against defendant was tried by the court without a jury and the issues were found against plaintiff and in favor of defendant, and plaintiff appeals from a judgment entered upon the finding.

It was stipulated by the parties that there was no issue of fact in the suit of plaintiff against defendant and that the decision in the case turned upon a question of law.

The first money order is dated July 6, 1945, and came

-3-

into the possession of plaintiff at the beginning of that month. The second money order is dated August 2, 1945, and came into the possession of plaintiff at the beginning of that month. The money orders were given to plaintiff by Dent in payment of rent for certain premises owned by plaintiff. Defendant issued the money orders at the instance of Dent. They were drawn upon "Central National Bank in Chicago, Ill." and were made payable to the order of plaintiff. Plaintiff deposited the money orders in the bank about September 12 or 13, 1945, and they were returned to plaintiff by that bank about September 14, 1945, with the legend "Payment Stopped" stamped thereon. Defendant stopped payment on the money orders on September 10, 1945. On September 10, 1945, ~~Don~~ Simms signed and gave defendant the following instrument:

"Affidavit for Lost Money Order

"STATE OF ILLINOIS)
)ss
County of Cook)

"The undersigned, being first duly sworn, on oath deposes and says: That a Money Order Numbered 65540 and 68107 dated 7/6/45 and 8/2/45 for \$47.50 ea. payable to Morris Invest. and issued to me by Dayton Curr. Exchge has been lost or destroyed; that I have not been able, by a diligent search to discover the same; that this affidavit is made for the purpose of securing a duplicate Money Order Numbered 71396 and 71397, receipt of which is hereby acknowledged and I agree to reimburse the said currency exchange for all loss, damage, cost or expenses of any kind if the above described Money Order is presented for payment and bearing the true endorsement of the payee.

"Don W. Simms (Seal)

"5439 Indiana

"Subscribed and sworn to before me

this 10th day of September, A. D. 1945.

"(seal) L. Chisom,
"Notary Public"

(Italics ours.)

Plaintiff claims that the record shows that until the affidavit was presented to defendant Sims was a stranger to the transaction. Defendant, realizing the force of this claim, states in his brief that Sims was a nephew and agent of Dent, but the record fails to support that statement. In any event, it is admitted that the money orders were made payable to plaintiff and that they were given to plaintiff by Dent in July and August, 1945, in payment of rent. The record fails to show that defendant made any attempt to test the right of Sims to have the amount of the money orders "refunded" to him. Indeed, the affidavit states that it "is made for the purpose of securing a duplicate Money Order Numbered 71396 and 71397, receipt of which is hereby acknowledged." But it is obvious that if defendant had issued duplicate money orders, they would, of course, have had to be made payable to plaintiff, and defendant would not have paid duplicate money orders without the indorsement of plaintiff. Instead of issuing duplicate money orders defendant saw fit to pay over to Sims, a stranger to the transaction, the amount of the original money orders although Sims did not state in the affidavit that he was the owner of the money orders. The statement in the affidavit that the money orders were lost was false, as they had been turned over to plaintiff by Dent in payment of rent. The statement in the affidavit that the money orders had been issued to Sims was also false, as the orders show upon their face that they were issued at the instance of Dent. When the affidavit was presented by Sims, had defendant made inquiry of plaintiff, the payee in the money orders, he would have immediately learned that the statement in the affidavit that the money orders were lost or destroyed was false, and that plaintiff had possession and owner-

this 10th day of August, 1947.

"(seal) L. O'Hara,
"Money Order"

(L. O'Hara)

Plaintiff also states that until the

allevit was presented to the bank, the bank was a stranger to the transaction. Plaintiff also states that this claim, states

in his brief that Plaintiff was not a party to the transaction, but the record fails to show that Plaintiff was not a party to the transaction, it is not

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also false, and Plaintiff states that it is not a party to the transaction, and Plaintiff states that

ship of the orders. The record fails to show that defendant made any inquiries of Dent, at whose instance the orders were issued, before he paid the money to Sims.

The trial court decided the case upon the theory that the money orders were negotiable instruments and were to all intents and purposes checks of the Dayton Currency Exchange. The money orders were issued under the Community Currency Exchange Act (ch. 16 1/2, par. 31 et seq., Ill. Rev. Stat. 1945) and plaintiff claims that under that Act defendant was only authorized to issue "money orders" and that the words "money orders" as used in the Act cannot be construed to mean checks, and, therefore, par. 207 of the Negotiable Instruments Act (ch. 98, par. 207, sec. 185, Ill. Rev. Stat. 1945), which declares that a check must be presented for payment within a reasonable time, does not apply to said "money orders." We find no merit in this contention. The money orders were in writing, signed by defendant, and contained an unconditional promise to pay to the order of plaintiff a sum certain in money, payable at the Central National Bank. "A check is a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds, for the payment, at all events, of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand." (5 Am. & Eng. Ency. of Law, - 2d ed. - 1029.)" (Martin v. Martin, 202 Ill. 382, 385, 386. See, also, Wright v. Loring, 351 Ill. 584, 589.) We hold that the money orders in question were checks of defendant.

Plaintiff next contends that the court erred in denying it a judgment for the amount of the money orders because its failure to deposit the money orders promptly did not cause any loss to defendant. This contention, in our judgment, is a meritorious one. While it may be conceded for the purposes of

this appeal that plaintiff failed to present the money orders for payment within a reasonable time, as par. 207 of the Act requires, nevertheless, it appears that defendant suffered no damage by reason of the said failure. The want of due presentment of a check does not discharge the drawer unless he has suffered some loss or injury thereby. This is one point of difference between a check and a bill of exchange. (See Industrial Bank v. Bowes, 165 Ill. 70, 76.) Par. 207 of the Negotiable Instruments Act reads as follows:

"207. Check must be presented - When.] Sec. 185. A check must be presented for payment within a reasonable time after its issue, and notice of dishonor given to the drawer as provided for in the case of bills of exchange, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

It is a matter of common knowledge that many people do not promptly deposit checks that they receive and it is only when the drawer of a check suffers some loss through the delay that the delay becomes a matter of any consequence. It would be a serious reflection upon **justice** if the drawer of a check could avoid payment of the same merely because the drawee did not deposit the check promptly. Defendant did not give Sims the amount of the money orders because plaintiff had failed to deposit them promptly. If we assume that defendant acted in good faith in the transaction with Sims, nevertheless, it appears that he paid Sims the amount of the money orders because he believed the statement in the affidavit that the money orders were lost, but before he paid the money he caused Sims to sign an agreement that he would reimburse defendant for the money paid Sims "if the above described Money Order is presented for payment and bearing the true endorsement of the payee," plaintiff. At that time defendant conceded, in

effect, that if plaintiff presented to defendant the money orders duly indorsed by plaintiff, defendant would be obliged to pay plaintiff the amount of the orders. That defendant was guilty of gross carelessness in paying the amount of the money orders to Sims, cannot be reasonably questioned. When plaintiff sued defendant for the amount of the money orders the latter caused a third party notice to be issued to Sims and Dent, and that proceeding is still pending in the trial court. In that proceeding defendant notified Sims and Dent that the two money orders had been presented by plaintiff to defendant for payment and that they bear the true indorsement of plaintiff company; that "you have agreed to reimburse the Dayton Currency Exchange upon this contingency happening by virtue of your affidavit of September 10, 1945." Under the facts of this case it is idle for defendant to argue that he suffered damages by reason of the failure of plaintiff to promptly deposit the money orders. The claim, now made by defendant, that he sustained a loss by reason of plaintiff's failure to deposit the money orders promptly, is a mere afterthought. Plaintiff was entitled to recover from defendant.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded with directions to the trial court to enter judgment in favor of plaintiff and against defendant in the sum of \$95 with interest from July 6, 1945.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.

3 321.A. 658¹

44078

JOHN D. KIRCHKNOPF,
Appellee,

v.

JOSEPH J. TANDARIC and
MARION TANDARIC,
Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, John D. Kirchknopf, originally brought two actions against defendants, Joseph J. Tandaric and Marion Tandaric, in a Justice of the Peace court. One was an action of forcible detainer to obtain possession of premises plaintiff purchased from defendants and the other an action for damages for wrongfully withholding such possession. Judgments were entered in favor of plaintiff for possession and for \$90 damages. Defendants appealed to the Superior court of Cook county where the two actions were consolidated and tried without a jury. The court found the issues against defendants and entered a judgment order, which included a judgment in favor of plaintiff for possession of the premises and a judgment for \$112 damages. Defendants appeal to this court from said judgment order.

On April 12, 1946 plaintiff entered into a written contract with the defendants for the purchase of their home at 9611 Merton avenue, Oak Lawn, Illinois. The contract contained the following clause: "Possession to be given purchaser on or before ninety days from the date of closing this deal." There was no provision in the contract for the payment of rent by defendants during said ninety day period. The deal was closed on July 24, 1946.

Defendants testified that, after the closing of the deal, plaintiff requested them to pay rent; that they told him they thought they were supposed "to have the three months rent free"; that plaintiff told them he needed money to meet his mortgage payments of \$40 a month at the "Building and Loan" and he wanted to know how much rent he could get from them; and that they then agreed to pay plaintiff \$40 monthly as rent.

Defendants paid plaintiff \$40 on August 3, 1946, \$49.10 on September 3, 1946 and \$40 on October 1, 1946 and received receipts from him specifying that such payments were for "rent." The "rent" thus paid covered the period commencing July 25, 1946 and ending October 31, 1946. It was stipulated upon the trial that no "certificate relating to eviction" was issued to plaintiff by the OPA Area Rent Director and that no statutory written notice of termination of tenancy was ever given to defendants.

Plaintiff testified that at the time the deal was closed he told the defendant, Joseph J. Tandaric, that he (plaintiff) had monthly mortgage payments to make on the property commencing July 24, 1946 and that while Tandaric remained in the premises he should make those payments for him; that Tandaric's payments would be for the use of the property; that there was never anything mentioned about free rent; and that he (plaintiff) "figured" that defendants were only going to be in the property for a couple of months. It was stipulated that if plaintiff's wife testified her testimony would be substantially to the same effect as his.

When defendants refused to surrender possession of the property to plaintiff on November 1, 1946, he filed his actions of forcible detainer and for damages before the Justice of the Peace on November 15, 1946.

The judgment order of the Superior Court was entered December 27, 1946 and defendants sought to vacate said

Defendants testified that, after the closing of the deal, plaintiff requested them to pay rent; that they told him they thought they were supposed to have the three months rent free; that plaintiff told them he needed money to meet his mortgage payments of \$40 a month for the "building and loan" and he wanted to know if they would get from them; and that they then agreed to pay plaintiff \$40 monthly as rent. Defendants paid \$40 on August 3, 1946, \$40.10 on September 3, 1946, \$40 on October 3, 1946 and received receipts from plaintiff for each payment. Defendants were for "rent." The "rent" was paid to plaintiff in cash commencing July 25, 1946 and ending October 3, 1946. Plaintiff testified upon the trial that no "receipts" were given to them and that no receipt was turned to plaintiff by the defendants. Plaintiff testified that no receipt was given to defendants. Plaintiff testified that the deal was closed. Plaintiff testified that he (plaintiff) had told the defendants, and that he (plaintiff) had mentioned about "rent" and that he (plaintiff) "knew" that defendants were only going to be in the property for a couple of months. It was stipulated that plaintiff's wife testified her testimony would be substantially to the same effect as his. Plaintiff testified that he understood possession of the property to plaintiff on November 1, 1946, he filed his actions of forcible detainer and for damages before the Justice of the Peace on November 1, 1946. The judgment order of the Superior Court was entered December 27, 1946 and defendants sought to vacate said

order by filing and presenting on February 10, 1947 a written motion in the nature of a writ of error coram nobis pursuant to section 72 of the Practice Act (par. 196, chap. 110, Ill. Rev. Stat. 1945), in which they averred inter alia that after the appeals were taken from the judgments entered by the Justice of the Peace and prior to the trial of "said causes" in the Superior court, "plaintiff, without any notice or knowledge to the defendants, caused to be filed with the Area Rent Director of the Office of Price Administration at Chicago, Illinois, on December 16, 1946 a certain petition for a certificate of eviction duly signed and executed by plaintiff and praying for the issuance of a certificate of eviction pursuant to Section 6 of the Housing Regulation issued under 56 Stat. 23,765; Public Law 383, 78th Congress, 10 Federal Register 13,528"; that "the subject matter of said petition was the premises involved in this proceeding"; that on or about February 6, 1947 "the defendants received from the Area Rent Director, Chicago Defense Rental Area, Office of Price Administration, a duplicate original of a certain certificate of eviction authorizing the plaintiff to institute action for possession of the premises in question here 'not sooner than April 19, 1947'"; and that "at the time of the entry of the judgments aforesaid in this cause, neither the Court nor the defendants knew that plaintiff had previously applied to the OPA for a certificate of eviction; nor did the Court or the defendants know at that time that the OPA Area Rent Director had taken jurisdiction of the matter in controversy here for the purpose of issuing a certificate of eviction; and defendants further state that, had the Court known at that time that the OPA Rent Director contemplated issuance of said certificate of eviction, the Court would not have caused the aforesaid judgment for possession and damages to be entered but would have deferred all further pro-

ceedings until the effective date of said certificate of eviction."

Defendants' foregoing motion was denied. By leave of the trial court they were allowed to amend their notice of appeal theretofore filed to include an appeal from the order denying said motion.

Defendants first contend that "under an agreement providing for payment of rent monthly, the party occupying the premises becomes a tenant from month to month and is entitled to thirty days' notice in writing to terminate such tenancy."

This contention contains a correct statement of law but the real question presented is whether there was an agreement between the parties that defendants would pay plaintiff monthly rent as such. As we view the evidence, no such agreement was made or intended to be made. It can not be said that the parties created or intended to create a landlord and tenant relationship, unless it can also be said that they intended to abrogate the clause in the purchase contract, whereby defendants were required to deliver possession of the premises to plaintiff on or before ninety days after the deal was closed. It is not claimed by defendants that said clause was abrogated. The dealings between the parties concerned primarily a contract of purchase and sale of a house and the arrangement whereby defendants paid plaintiff compensation for the occupancy thereof after the deal was closed was merely incidental and subordinate to such contract. When it was agreed between the parties on July 24, 1946, after the deal was closed on that day, that defendants would pay plaintiff \$40 a month, that arrangement could only have been intended to cover the ninety day period at the expiration of which defendants were to deliver possession of the house to plaintiff and it seems clear that it was made solely for the purpose of compensating plaintiff for the monthly payments he was required to make on his mortgage

meetings until the 15th of the month of October 1940.

To avoid the possibility of a default on the part of the first mortgagee, the first mortgagee was required to pay the interest on the second mortgage. The first mortgagee was required to pay the interest on the second mortgage.

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while defendants were occupying the house during said period. It is true that the \$40 monthly payments were referred to by the parties as rent when such arrangement was made and it is also true that the word "rent" was used in the receipts heretofore referred to, which were signed by plaintiff and given to defendants when the payments were made in August, September and October, 1946. However, we think that the word "rent" was loosely and inaccurately used, because the defendants were obligated under the purchase contract to surrender possession of the premises to plaintiff within ninety days after the deal was closed and the parties unquestionably intended the payments made by defendants as compensation for their use and occupation of the premises during that period. It is inconceivable that plaintiff, in need of a dwelling place for himself and his family and desirous of moving into same as soon as possible, would purchase a home and on the very day that the purchase was consummated agree to rent same to his vendor. In our opinion no such result was intended by plaintiff or defendants when the agreement was made for the payments of \$40 a month and therefore a landlord and tenant relationship was not created between the parties. Since defendants did not become tenants from month to month, they were not entitled to thirty days notice in writing to terminate tenancy.

Defendants' next contention is that "occupation and payment of monthly rent creates a tenancy from month to month." It is of course the law that occupation and payment of monthly rent creates a month to month tenancy but, since we have held that the monthly payments made by defendants to plaintiff were not for rent as such but for the use and occupation of the premises for not to exceed ninety days as specified in the purchase contract, there was no month to month tenancy created.

Defendants argue at length several contentions bearing

while defendants were occupying the house during said period. It is true that the 140 monthly payments were referred to by the parties as rent when such payment was made and it is also true that the word "rent" was used in the receipts heretofore referred to, which were signed by defendant and given to defendants when the payments were made in August, September and October, 1940. However, we think that the word "rent" was loosely and inaccurately used, because the defendants were obligated under the purchase contract to be in regular possession of the premises to which plaintiff's title was given after the deal was closed and the parties mutually intended the payments made by defendants as so much for their use and occupation of the premises during the period. It is inconceivable that plaintiff, in need of a place to live, would not have been fully and definitely of moving into the premises and would purchase a home and on the same day the premises were conveyed agreed to rent a place to live. It is true that no such result was intended by plaintiff on the day the contract was made for the purchase of the premises. Therefore a landlord and tenant relationship was not created. Since defendants did not intend to rent the premises, they are not entitled to a judgment in their favor to terminate tenancy. Plaintiff's contention that "rental" and "rent" meant of and for the use and occupation of the premises in of course the law is undisputed and payment of monthly rent creates a landlord and tenant relationship. It is held that the monthly payments referred to by plaintiff were not for rent as such but for the use and occupation of the premises for not to exceed ninety days as specified in the purchase contract, there was no month to month tenancy created. Defendants argue at length several contentions bearing

on the rent regulations, the protection and benefit of which they claimed in their motion in the nature of a writ of error coram nobis. These contentions and the numerous authorities cited in support thereof would be germane and applicable if there was a landlord and tenant relationship between the parties but, as has been shown, there was no such relationship. In our opinion the rent director had no jurisdiction in a situation of purchase and sale such as we have here, where the vendor agreed in the contract of purchase to surrender possession of the property at a specified time and therefore plaintiff was not subject to or bound by the OPA rent regulations. (Montano et al. v. Kimmel, 57 N. Y. S. 281, 2d. series.) The fact that plaintiff did apply to the rent director for a certificate of eviction and then abandoned his application therefor is immaterial, since he had the right to maintain his action without the issuance of such a certificate. The trial court properly denied defendants' motion in the nature of a writ of error coram nobis.

For the reasons stated herein the judgment of the Superior court of Cook county is affirmed in toto.

JUDGMENT ORDER AFFIRMED IN TOTO.

Friend, P. J., and Scanlan, J., concur.

43928

HOWARD RIPKE, Administrator of the
Estate of GUSTAVE RIPKE, Deceased,

Appellant,

v.

CHARLES J. BERNSTEIN,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

33 6582

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action under the Injuries Act (Chapter 70, Ill. Rev. Stats.) with verdict and judgment for defendant. Plaintiff has appealed.

On October 2, 1944 at about 10:30 P.M., plaintiff's intestate was injured when struck by defendant's automobile at the intersection of Kimball and Leland avenues in Chicago. He died as a result of the injuries October 7, 1944. When the accident occurred defendant was driving north on, and a few feet east of the center line of, Kimball Avenue toward his mother's home where he was to spend the night. Decedent was crossing Kimball Avenue from west to east on his way to the Elevated Station on the east side of Kimball Avenue between Leland Avenue and Lawrence Avenue, one block north. He had been visiting a cousin and was on his way home.

The issues here are whether the verdict is against the manifest weight of the evidence and whether the court committed prejudicial error in the giving of certain instructions. Plaintiff had the burden of proving that, at the time of the accident, decedent was in the exercise of due care, was struck by the automobile negligently driven by defendant and died of injuries proximately caused by defendant's negligence. The parties stipulated that the injuries decedent suffered caused his death.

HOWARD NIKKE, Administrator of the
Estate of GUSTAVE NIKKE, Deceased,

Appellant,

v.

CHARLES J. KENNEDY,

Appellee.

MR. JUSTICE KILPATRICK

This is an action

Rev. State, with venue

has appealed.

On October 1, 1934, the plaintiff, Howard Nikke, deceased,

was injured when struck by the automobile of the defendant,

Charles J. Kennedy, on the highway near the intersection of

the highway and the highway, and the defendant was

driving north on the highway at the time of the accident.

The defendant was driving north on the highway at the time of the accident.

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At the time of the accident the street lights were burning at the northwest corner and the southeast corner at a point opposite the south crosswalk of Leland Avenue. The street lights on Leland Avenue were also burning at the time. The first light to the west of Kimball Avenue on the south side of Leland Avenue was 60 feet from the intersection. At the southwest corner was a school yard covered with white gravel. Kimball Avenue was 40 feet wide and Leland Avenue was 30 feet wide at the intersection. Kimball Avenue is a through street. There were no parked automobiles in the vicinity at the time.

A heavy rain was falling as defendant's car approached the intersection with its medium lights burning. These lights had a range of about 100 feet ^{which} ~~and~~ extended from curb to curb. Visibility was clear, but for the rain, and defendant's circular windshield wipers were in operation so that he could see ahead. He could not see through the side windows because of the rain. He had been driving north for several blocks on Kimball Avenue and about a half block south of Leland Avenue, he reduced his speed 5 miles and when he reached the south crosswalk of Leland Avenue, was driving between 20 and 25 miles an hour. He did not see decedent before the accident. He heard a thump, stopped his car and returned to find decedent lying injured on the pavement. Decedent was dressed in dark clothes and was without a top coat or umbrella.

We think the evidence shows that defendant felt the "thump" at or near the crosswalk. This would indicate that decedent was crossing Kimball Avenue in or near the crosswalk, so as to come within the advantage given pedestrians under Chap. 95 $\frac{1}{2}$, Par. 171, Ill. Rev. Stats: That statutory right-of-way is not absolute; cannot be relied upon entirely; does not absolve pedestrians from requirements of due care; and the question of contributory negligence

at the time of the
at the northwest corner
occasionally the road
on Ireland Avenue near
to the west of Ireland
was 50 feet from the
school yard across the
feet wide and Ireland
highly irregular
in the vicinity of
a heavy road
intersection with
range of about 100
was clear, but the
whereas the road
has been built the
north for several
south of Ireland
reached the road
50 and 60 miles
He heard a snort,
lying injured and
and was without
The animal
at or near the
crossing Ireland
within the school
Ill. Rev. Stat.
cannot be relied
requirements of the

depends upon the facts of each case. Moran v. Gatz, 390 Ill. 478.

Decedent had the right to believe defendant knew of the proximity of Leland Avenue where pedestrians might be crossing; and that defendant would have his car under control, so as to avoid hitting any object, and especially so as to yield the right-of-way to a decedent on the crosswalk. Moran v. Gatz. The fact the person injured was not able to give testimony in this case, made it necessary to infer from the circumstances in evidence what his conduct should have been under the circumstances. These circumstances are the heavy rain, decedent's lack of an umbrella and a top coat; the time of night, his destination, the through street; the speed of, and the lights on, defendant's car and the visibility of the lights; the place of the "thump", and decedent's position after the accident. Those circumstances made the question of decedent's contributory negligence one of fact for the jury. The jury had before it also the competent testimony of decedent's previous habits of due care, given by his widow, son and cousin. We cannot say that the jury could not have inferred that decedent was not in the exercise of due care as he sought to cross the street.

On the question of defendant's negligence there is evidence of his knowledge of the neighborhood and of the location of the Elevated Station, and the lighting of the intersection; his driving more than 20 miles per hour when he entered the crosswalk; his failure to see decedent although the lights on defendant's car shown 100 feet ahead and threw light on both curbs; and that defendant was not aware of striking decedent until the "thump" was heard at the crosswalk. There were no marks on defendant's car or the street to aid in reconstructing the accident. On the other hand there was evidence that Kimball Avenue was a through

street; that a heavy rain was falling; that decedent was dressed in dark clothes; that defendant could not see through the side windows of his car and that the nearer he approached the crosswalk the more limited became his vision straight ahead; and that decedent was found in or at the crosswalk. We cannot say that the jury should have found the defendant guilty of negligence on this evidence and we do not believe we should disturb the jury's verdict. We have read the cases cited by plaintiff. They are different factually from the instant case and are not helpful.

None of the instructions attacked are in our opinion vulnerable for omitting the question of decedent's right of way on the crosswalk. The instructions on contributory negligence are abstract and purport to state merely the requirements upon decedent as to the use of ordinary care, etc. That decedent had the advantage of right of way was plaintiff's theory, not defendant's. Plaintiff gave no instruction on the right-of-way theory bearing on contributory negligence. So long as defendant did not include facts in the instructions as in Krawitz v. Levinstein, 320 Ill. App. 618, we see no necessity for his referring to the right of way.

Instruction No. 8 is not a good instruction. It is too involved, difficult to understand and is inaccurate. Instruction No. 12 on the number of witnesses could not have harmed plaintiff. Neither of these instructions is peremptory. Instructions 9, 10, 11 and 18 are peremptory. Instruction No. 18 should not have been given. The answer denied decedent was in the exercise of due care. Neither side, therefore, claimed that the accident was without negligence. We think instruction No. 9 correctly stated the requirement of care as to decedent but could have been clearer and more direct in defining proximate cause. Instruction No. 10 was defective

in that it required the decedent to have been free of guilt of any want of ordinary care. Instruction No. 11 does not include facts so as to be vulnerable as was instruction No. 4 in Adamsen v. Magnellia, 286 Ill. App. 412. It is worded differently than instruction 11 in Levin v. Lauterbach Coal & Ice Co., et al., 329 Ill. App. 180. We think instruction No. 11 in the instant case is consistent with the rule announced in Moran v. Gatz, though it could have stated more definite^{ly}/that contributory negligence to preclude plaintiff's recovery must be a proximate cause of the injury.

There is a difference in failing to include an element in a peremptory instruction and in stating an element imperfectly. We see no reason to reverse this case because of the instructions. We cannot say that the four peremptory instructions on contributory negligence were disproportionate to the total number of 20 instructions given, nor that by the giving of those four instructions the element of contributory negligence of decedent was over-emphasized to plaintiff's disadvantage.

For the reasons given the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

in that it required the defendant to have been free of guilt at any
 want of ordinary care. Instruction No. 10 does not include such
 as to be vulnerable as was instructed in People v. [redacted]
People v. [redacted], 198 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

injury.
 There is a difference of opinion as to whether it is
 a peremptory instruction or a question for the jury.
 We see no reason to believe that it is a question for the jury.
 We cannot say that it is a peremptory instruction.
 negligence were distinguished from the total negligence of the defendant
 given, not that of the defendant, but that of the defendant's servant
 of contributory negligence of the defendant's servant.
 Plaintiff's obligation.
 For the reasons stated, the court is of the opinion that it is
 affirmed.

1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000.

43828

HOWARD RIPKE, Administrator of the
Estate of GUSTAVE RIPKE, Deceased,

Appellant,

v.

CHARLES J. BERNSTEIN,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

ON REHEARING

332 I.A. 658³

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action under the Injuries Act (Chapter 70,
Ill. Rev. Stats.) with verdict and judgment for defendant.
Plaintiff has appealed.

On October 2, 1944 at about 10:30 P.M., plaintiff's
intestate was injured when struck by defendant's automobile at the
intersection of Kimball and Leland avenues in Chicago. He died as
a result of the injuries October 7, 1944. When the accident occurred
defendant was driving north on, and a few feet east of the center
line of, Kimball Avenue toward his mother's home where he was to
spend the night. Decedent was crossing Kimball Avenue from west
to east on his way to the Elevated Station on the east side of
Kimball Avenue between Leland Avenue and Lawrence Avenue, one block
north. He had been visiting a cousin and was on his way home.

The issues here are whether the verdict is against the
manifest weight of the evidence and whether the court committed
prejudicial error in the giving of certain instructions. Plaintiff
had the burden of proving that, at the time of the accident,
decedent was in the exercise of due care, was struck by the auto-
mobile negligently driven by defendant and died of injuries prox-
imately caused by defendant's negligence. The parties stipulated
that the injuries decedent suffered caused his death.

NOTICE: The following information is being furnished to you for your information only. It is not intended to be used for any other purpose.

DATE: 10/10/1960

TO: [REDACTED]

FROM: [REDACTED]

SUBJECT: [REDACTED]

REFERENCE: [REDACTED]

REMARKS: [REDACTED]

ADDITIONAL INFORMATION: [REDACTED]

DISCUSSION: [REDACTED]

CONCLUSION: [REDACTED]

RECOMMENDATION: [REDACTED]

APPROVAL: [REDACTED]

SIGNATURE: [REDACTED]

DATE: 10/10/1960

At the time of the accident the street lights were burning at the northwest corner and the southeast corner at a point opposite the south crosswalk of Leland Avenue. The street lights on Leland Avenue were also burning at the time. The first light to the west of Kimball Avenue on the south side of Leland Avenue was 60 feet from the intersection. At the southwest corner was a school yard covered with white gravel. Kimball Avenue was 40 feet wide and Leland Avenue was 30 feet wide at the intersection. Kimball Avenue is a through street. There were no parked automobiles in the vicinity at the time.

A heavy rain was falling as defendant's car approached the intersection with its medium lights burning. These lights had a range of about 100 feet which extended from curb to curb. Visibility was clear, but for the rain, and defendant's circular windshield wipers were in operation so that he could see ahead. He could not see through the side windows because of the rain. He had been driving north for several blocks on Kimball Avenue and about a half block south of Leland Avenue, he reduced his speed 5 miles and when he reached the south crosswalk of Leland Avenue, was driving between 20 and 25 miles an hour. He did not see decedent before the accident. He heard a "thump," stopped his car and returned to find decedent lying injured on the pavement. Decedent was dressed in dark clothes and was without a top coat or umbrella.

There was evidence to show that defendant felt the "thump" at or near the crosswalk. This would indicate that decedent was crossing Kimball Avenue in or near the crosswalk, so as to come within the advantage given pedestrians under Chap. 95½, Par. 171, Ill. Rev. Stats: That statutory right-of-way is not absolute; cannot be relied upon entirely; does not absolve pedestrians from requirements of due care; and the question of contributory negligence

1990-1991

SECRET

[illegible][illegible]

1970-1971

[illegible][illegible]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

depends upon the facts of each case. Moran v. Gatz, 390 Ill. 478.

If decedent had the right of way, then he had the right to believe defendant knew of the proximity of Leland Avenue where pedestrians might be crossing; and that defendant would have his car under control, so as to avoid hitting any object, and especially so as to yield the right-of-way to a decedent on the crosswalk.

Moran v. Gatz. The fact the person injured was not able to give testimony in this case, made it necessary to infer from the evidence what his conduct should have been under the circumstances. These circumstances are the heavy rain, decedent's lack of an umbrella and a top coat; the time of night, his destination, the through street; the speed of, and the lights on, defendant's car and the visibility of the lights; the place of the "thump"; and decedent's position after the accident. On this question there is also the competent testimony given by his widow, son and cousin of decedent's previous habits of due care.

On the question of defendant's negligence there is evidence of his knowledge of the neighborhood and of the location of the Elevated Station, and the lighting of the intersection; his driving more than 20 miles per hour when he entered the crosswalk; his failure to see decedent although the lights on defendant's car shown 100 feet ahead and threw light on both curbs; and that defendant was not aware of striking decedent until the "thump" was heard at the crosswalk. There were no marks on defendant's car or the street to aid in reconstructing the accident. On the other hand there was evidence that Kimball Avenue was a through street; that a heavy rain was falling; that decedent was dressed in dark clothes; that defendant could not see through the side windows of his car and that the nearer he approached the crosswalk the more limited became his vision straight ahead; and that decedent was found in or at the crosswalk.

upon the facts of each case. (Syllabus, p. 100.)

If defendant had the right of way, it was his duty to yield.

Even defendant knew of the proximity of the intersection.

It is not to be presumed that defendant was negligent.

Control, so as to avoid collision, was in the hands of the driver.

to yield the right-of-way to the car on the main highway.

. The fact that the car was stopped at the intersection.

any in this case, would be sufficient to establish negligence.

a car should have been stopped at the intersection.

stances are the facts that the car was stopped at the intersection.

stop case; the time of day, the weather, the condition of the road.

the speed of the car, the position of the car, the position of the car.

ity of the light; the position of the car, the position of the car.

on after the accident. The position of the car, the position of the car.

and testimony given by the witnesses. The position of the car, the position of the car.

as habits of the car. The position of the car, the position of the car.

On the question of the position of the car, the position of the car.

as of his knowledge of the position of the car, the position of the car.

Investigation, and the position of the car, the position of the car.

living more than 50 feet from the intersection. The position of the car, the position of the car.

his failure to see the car. The position of the car, the position of the car.

own 100 feet ahead of the car. The position of the car, the position of the car.

and was not aware of the position of the car. The position of the car, the position of the car.

and at the intersection. The position of the car, the position of the car.

effort to aid in reconstruction. The position of the car, the position of the car.

there was evidence that the car was stopped at the intersection. The position of the car, the position of the car.

a heavy rain was falling; the position of the car, the position of the car.

ed; that defendant could not see the car. The position of the car, the position of the car.

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limited because his vision straight ahead. The position of the car, the position of the car.

ound in or at the intersection. The position of the car, the position of the car.

*substituted for original
page 4*

4

The questions of decedent's due care and of defendant's negligence were submitted to the jury under instructions of the court. Plaintiff contends that the giving of several of the instructions constituted prejudicial error. None of the instructions attacked are in our opinion vulnerable for omitting the question of decedent's right of way on the crosswalk. The instructions on contributory negligence are abstract and purport to state merely the requirements upon decedent as to the use of ordinary care, etc. That decedent had the advantage of right of way was plaintiff's theory, not defendant's. Plaintiff gave no instruction on the right-of-way theory bearing on contributory negligence. So long as defendant did not include facts in the instructions as in Krawitz v. Levinstein, 320 Ill. App. 618, we see no necessity for his referring to the right of way.

Instruction No. 11 is peremptory and fails to include the element of proximate cause in its hypothesis precluding plaintiff from recovering because of decedent's contributory negligence. Consolidated Coal Co. v. Bokamp, 181 Ill. 9 ; Lerette v. Director General, 306 Ill. 348; Schmidt v. Anderson, 301 Ill. App. 28; Moore v. Edmonds, 384 Ill. 535; and Restatement of Torts, Sections 463 - 465. It is also objectionable in that it imposes on decedent the requirement of avoiding injury. Levin v. Lauterbach Coal & Ice Co., et al., 329 Ill. App. 180. Instruction No. 8 is not a peremptory instruction for the very reason we find instruction No. 11 prejudicially erroneous. A finding that decedent was guilty of contributory negligence, without the further finding of proximate cause, is not equivalent to a finding of not guilty. Instruction No. 8, however, is not a good instruction. It is too involved, difficult to understand and is inaccurate. Instruction No. 12 on the number of witnesses could not have harmed plaintiff. Instructions 9, 10 and 18 are peremptory. Instruction No. 18 should not have been given. The answer denied decedent was in the exercise of due care. Neither side, therefore, claimed that the accident was without negligence.

4

The questions of decedent's due care and of defendant's negligence were submitted to the jury under instructions of the court. Plaintiff contends that the giving of several of the instructions constituted prejudicial error. None of the instructions attacked are in our opinion vulnerable for omitting the question of decedent's right of way on the crosswalk. The instructions on contributory negligence are abstract and purport to state merely the requirements upon decedent as to the use of ordinary care, etc. That decedent had the advantage of right of way was plaintiff's theory, not defendant's. Plaintiff gave no instruction on the right-of-way theory bearing on contributory negligence. So long as defendant did not include facts in the instructions as in Krawitz v. Levinstein, 320 Ill. App. 618, we see no necessity for his referring to the right of way.

Instruction No. 11 is peremptory and fails to include the element of proximate cause in its hypothesis precluding plaintiff from recovering because of decedent's contributory negligence. Consolidated Coal Co. v. Bokamp, 181 Ill. 9. It is also objectionable in that it imposes on decedent the requirement of avoiding injury. Levin v. Lauterbach Coal & Ice Co., et al., 329 Ill. App. 180. Instruction No. 8 is not a peremptory instruction for the very reason we find instruction No. 11 prejudicially erroneous. A finding that decedent was guilty of contributory negligence, without the further finding of proximate cause, is not equivalent to a finding of not guilty. Instruction No. 8, however, is not a good instruction. It is too involved, difficult to understand and is inaccurate. Instruction No. 12 on the number of witnesses could not have harmed plaintiff. Instructions 9, 10 and 18 are peremptory. Instruction No. 18 should not have been given. The answer denied decedent was in the exercise of due care. Neither side, therefore, claimed that the accident was without negligence.

'0675580 . P . 193405 SEP

3. On the basis of the above, the following are the reasons for the increase in the number of people who are not working:

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2. 1972 年 10 月 1 日 起 施行

... .. 1900000 20

100-443683

THE UNIVERSITY OF CHICAGO

1. 1990年12月15日，在北京市召开的“中国环境与发展”会议上，中国领导人首次提出“可持续发展”的概念。

11. 12. 1957. 110200

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

Journal of Interpersonal Violence 26(10)

... (1997) ...

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$$f(x) = \frac{1}{2} \left(\frac{1}{x} + \frac{1}{x^2} \right) \quad , \quad \frac{1}{x} \neq \frac{1}{x^2}$$

We think instruction No. 9 correctly stated the requirement of care as to decedent but should have been clearer and more direct in defining proximate cause. Instruction No. 10 is defective in that it required the decedent to have been free of guilt of "any" want of ordinary care. We cannot say that the four peremptory instructions on contributory negligence were disproportionate to the total number of 20 instructions given. It is our view that the trial court committed prejudicial error in giving instruction No. 11, and that the jury was not properly instructed on the question of contributory negligence.

Because of the error in giving instructions the judgment of the Superior Court is reversed and the cause is remanded for a new trial. For this reason we shall not pass on the question of manifest weight of the evidence.

REVERSED AND REMANDED.

BURKE, P.J. AND LEWE, J. CONCUR.

43901

JACK GRODZINS,

Appellee,

v.

NOVADEL-AGENE CORPORATION,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

332 I.A. 659

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment in the sum of \$661 alleged to be due plaintiff, a salesman, for commissions. The cause was heard by the court without a jury. No appearance or brief was filed by plaintiff.

The statement of claim alleges that plaintiff worked under the following terms and conditions:

"(a) From July 1, 1938, until on or about July 1, 1939, the plaintiff was to receive on conditional sales of beer dispensing equipment sold for the defendant a total commission of ten (10) per cent of the sale price, payable as follows: 5% upon acceptance, 2½% upon receipt of the first monthly installment and 2½% upon receipt of the second monthly installment.

"(b) From on or about July 1, 1939, until the termination of his employment with the defendant on March 2, 1940, the plaintiff received on conditional sales of the aforesaid beer dispensing equipment the sum of 15, 17, 19, or 20 per cent of the sale price of the said beer dispensing equipment, with payment of commission as follows: -- 50% upon acceptance and 50% of the payment by the customer each month until the entire commission is paid.

"3. Plaintiff agreed, in accordance with defendant's interoffice correspondence dated June 2, 1939, and which was in effect for the duration of the plaintiff's employment with the defendant that "in the event that any sale which I close is cancelled before installment of the equipment, to refund the company the commission paid, or in the event that there are commissions due me, to have them charged against my account."

The statement of claim further alleges that during his employment plaintiff made sales in excess of \$70,000; that due to the uncertainty of the payments recharges and charge-backs, the plaintiff is unable to ascertain the amount of commission still due and owing and that to his best knowledge and belief there is due him the sum of \$1712.

In its answer defendant denies the allegations in paragraph 2(a) of the statement of claim and as to paragraph 2(b) defendant "denies the allegations in paragraph 2(b) of the Statement of Claim and states that during said period the plaintiff was to receive the sum of 15%, 17%, 18%, 19% and 20% with varying rates of payment; but admits that said paragraph 2(b) is substantially correct." The answer further avers that interoffice correspondence dated July 21, 1939 supplanted or superseded a former agreement and denies that defendant is indebted to plaintiff.

Defendant's principal contention is that there is no evidence tending to support the finding and judgment of the trial court. In his brief defendant's counsel says that he had three witnesses present in court and that instead of permitting defendant's witnesses to testify in some orderly manner the trial judge questioned defendant's counsel and rendered an arbitrary judgment.

An examination of the record discloses that two documents were offered in evidence by plaintiff. The first was marked "Plaintiff's Exhibit No. 1" and appears to be a copy of a letter dated June 2, 1939, signed by plaintiff and captioned "Kooler-Keg interoffice correspondence." The only reference to commissions in this exhibit is found in the third paragraph, which reads as follows:

"I agree, in the event that any sale which I close is cancelled and before installation of the equipment, to refund the company the commissions paid, or in the event that there are commissions due me, to have them charged against my account."

So far as the record shows this document was not received in evidence.

Plaintiff's Exhibit No. 2 was admitted in evidence without objection, and is entitled "Statement of J. M. Grodzins' account." This document was prepared by defendant and consists of four pages purporting to show sales made by plaintiff from April 29, 1938 to March 26, 1940. On the second and third pages are shown the names

In the case of the State of New York, the defendant
 "denies the fact that he is the owner of the
 and states that he is not the owner of the
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 "P. 1111" is the owner of the
 dated June 1, 1933, is the owner of the
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 to the case of the State of New York,
 this document is the owner of the
 outgrowing to the case of the State of New York,
 March 28, 1933, is the owner of the

of each purchaser and the commissions accrued. On the third page appear the canceled sales and commissions charged back. The first page appears to be a recapitulation of the total sums shown on the other pages.

Neither plaintiff's Exhibit 1 or 2 shows the terms of the agreement. Plaintiff testified that defendant agreed to pay him "ten per cent commission on everything that is installed and the commissions will be paid fifty per cent upon installation and the other fifty per cent on the first thirty days after it is installed." Plaintiff's case rests on his own testimony and the foregoing exhibits. The controversy revolves about commissions due plaintiff under the schedule of commissions as alleged in paragraph 2(b) of his statement of claim after making certain deductions for canceled sales and commissions charged back.

It appears that during the trial defendant's counsel produced the interoffice correspondence dated July 21, 1939 referred to in its answer, which provided for a new schedule of commissions to be paid plaintiff on sales of beer dispensing equipment, and that the trial court examined this correspondence, but it does not appear in the record.

Proof of the terms and conditions of plaintiff's employment as alleged in his statement of claim is an essential element of his cause of action. Because of the absence from the record of the interoffice correspondence dated July 21, 1939, upon which the defense is predicated we are not able to determine the precise terms and conditions of plaintiff's contract with the defendant, nor do the findings of the court aid us in this respect.

The record shows that in order to effect a settlement of plaintiff's claim the trial judge interrogated counsel for the respective parties at great length about commissions alleged to

be due plaintiff on many of the disputed items shown in plaintiff's Exhibit number 2. Afterwards the trial judge examined plaintiff and one of defendant's witnesses while plaintiff was ostensibly putting in his case in chief.

Defendant complains that he was not given an opportunity to offer in evidence in his behalf interoffice correspondence dated July 21, 1939 before the court announced its findings. It is not improbable that defendant's counsel believed that he would be permitted to offer further proof, but was confused, as he says he was, by the informality of the proceedings. The parties should have been permitted to introduce their evidence in the regular order.

We think the record clearly shows that defendant was prejudiced by being precluded from introducing in evidence documentary proof and further testimony to sustain his defense.

For the reasons assigned, the judgment is reversed and the case is remanded for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

KILEY AND BURKE, JJ. CONCUR.

be due primarily to the fact that the defendant's
 Exhibit number 2, which was submitted in evidence
 and one of the defendant's exhibits was submitted
 during the trial.

Defendant's Exhibit number 2, which was submitted in evidence

to offer in evidence in the trial, was submitted
 dated July 27, 1932, and was submitted in evidence. It
 is not impossible that the defendant's Exhibit number 2
 be permitted to offer in evidence, and the defendant
 has, by the introduction of the defendant's Exhibit
 have been permitted to offer in evidence the defendant's
 Exhibit number 2, which was submitted in evidence.

Defendant's Exhibit number 2, which was submitted in evidence
 prejudiced the defendant's case, and the defendant's
 Exhibit number 2, which was submitted in evidence, was
 not and the defendant's Exhibit number 2, which was
 For the reasons stated, the defendant's Exhibit number 2
 the case is reversed and the defendant's Exhibit number 2

W. H. H.

W. H. H.

43973

OLE BENESTAD,

Appellant,

v.

EDWARD VANDER MOLEN, doing business
as VANDER MOLEN REFUSE DISPOSAL
SERVICE, and WILLIAM PALMORE,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

3321A.620

MR. PRESIDING JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for personal injuries sustained by plaintiff resulting from a collision of plaintiff's automobile and defendants' truck at a street intersection. There was a jury trial and verdict and judgment in favor of defendants. Plaintiff appeals.

The evidence shows that at about seven o'clock in the morning of February 15, 1945, defendant William Palmore was driving a twelve-ton dump truck owned by defendant Edward Vander Molen, doing business as Vander Molen Refuse Disposal Service, east in the eastbound street car rails of North Avenue in the City of Chicago. At the intersection of Pulaski Road Palmore made a left turn and proceeded in a northerly direction. On the morning of the occurrence plaintiff was driving his automobile, a two-door 1937 Ford, west on the north side of North Avenue. When the front end of defendants' truck reached the north curb of North Avenue, the front end of plaintiff's automobile struck the right side of the truck. At the time of the accident it was raining, the streets were wet and the visibility was poor.

Plaintiff contends that the verdict is against the manifest weight of the evidence.

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Harold Dultz, called by plaintiff, testified that he was standing at the northeast corner of the intersection on his way to board an eastbound North Avenue street car; that he saw defendants' truck proceeding east "with one light" and assumed that it was a street car; that plaintiff's automobile passed him "going about fifteen or twenty miles per hour; as it passed me a dump truck swerved sharply from North Avenue in a northeasterly direction and collided with the car. The truck was traveling between twenty-five or thirty miles per hour as it made the sharp turn." On cross-examination the witness testified that the street lights were dim and he could see about one-half or three-quarters of a block to the west; that after the impact the truck traveled about six or eight feet; "it was a little bit past the north curb of North avenue when it stopped"; and that the Ford car traveled about fifteen feet after it passed him before the collision occurred.

Warren Glavin, a police officer called by plaintiff, testified that he was assigned to the Accident Prevention division; that when he arrived at the scene of the accident he found damage to the right side of the truck "from the fender back" and that "one headlight was out on the truck."

Plaintiff testified in his own behalf substantially as follows: That he was 67 years of age and for many years had been in the painting and decorating business; that before reaching the intersection he was driving west in North Avenue between the westbound street car rails and the curb; that there was a safety island on the north side of North Avenue extending east and west at the northeast corner of the intersection; that as he reached the safety island he was going about fifteen miles per hour ten

[illegible]

or twelve feet south of the north curb; that when he reached the safety island he saw a headlight on the eastbound track of North Avenue about a hundred feet west of the northwest corner of the intersection; and that after he passed the northeast corner he observed that "the headlight and truck was then about ten or twelve feet a little to the southwest of me; I tried to turn the wheel to the left; I was going between twelve and fifteen miles per hour; then there was a collision; the right front of the automobile and the right-hand side of the truck came together."

On cross-examination he testified "my dim lights were on; it was very dark; I could see about forty feet in front of my automobile; I slowed down as I got up to the safety island; the truck had one light on the front; I stepped on the brake and tried to turn to the left; the front end of my car went into the side of the truck; I could see about a quarter of a block ahead of me; I could not see across North Avenue." The plaintiff further testified that he did not blow his horn, nor did he hear any horn or see any signal from the driver of the truck before the impact.

Jerry O'Connor, a traffic officer of the City of Chicago, called by defendants, testified that he was just coming home from work when the accident happened; "I heard the collision; it was quite a loud crash. The truck was facing north on Pulaski; it was just north of the cross-walk; the front part of the truck was past the north curb of North Avenue; the car (plaintiff's Ford) was jammed underneath between the rear wheels and the cab; the front of the Ford was pushed in quite a bit." On cross-examination

Witness O'Connor testified that he did not see the impact occur but got there thirty or fifty seconds after it happened, and that there was one headlight burning on the truck.

Robert Forge, called by defendants, testified that he was employed by defendant Vander Molen and accompanied defendant Palmore on the day of the accident; that before starting to turn the truck was going about ten miles an hour; "it was slippery that morning, bad weather; when we got up to Pulaski I saw an automobile which looked like a block away; it was traveling in the westbound car line on North Avenue"; that the truck was not going more than five miles an hour when it made the turn; "I was sitting on the right-hand side; the next time I saw the (plaintiff's) auto it was pulled around to the right of the safety island; our truck was facing straight north at the time of the collision; when I got out I found a man wedged up under the dashboard of his car; the front of the Ford car was up under the truck." On cross-examination the witness testified that he saw plaintiff's automobile "as he was pulling around that island; he must have been going thirty-five or forty miles an hour; as far as I know there were two headlights burning on the truck."

Herman Schroeder, called by defendants, testified that he was in the automobile repair business; that he examined plaintiff's car and found the whole front end pushed in; and that the front bumper was bent, the motor block was pushed back, and the front seat was bent.

Defendant Palmore, testified that he was driving a scavenger dump truck with dual wheels; that on the day of the occurrence he was traveling east on North Avenue in the eastbound street car rails, going about ten or twelve miles an hour; that when he reached Pulaski Road he saw an automobile, "two headlights that were coming practically a block and a half or two blocks east of me"; that as he started to turn into Pulaski plaintiff's car was about a block away; that when he had almost completed the turn at Pulaski Road he saw

plaintiff's car swing to the right of the safety island, "he (plaintiff) was coming at a terrific speed then; the next thing he hit; when the impact occurred the front end of my truck was north of the north sidewalk; at that time I was going about five miles per hour; when I started to turn, the (plaintiff's) car must have been three hundred feet away." On cross-examination Witness Palmore testified that when plaintiff's automobile was about a half a block away from the intersection defendants' truck was traveling almost straight north, and that he did not know whether he had one headlight on the truck when the accident occurred.

Plaintiff argues that defendants failed to observe certain sections of the statutes contained in chapter 95¹/₂, namely, Art. IX, Par. 166, sec. 69 relating to vehicles turning left at an intersection; Art. XV, Par. 200, sec. 103, as to when driving lamps are required; and Art. XV, Par. 209, sec. 112, concerning the number of driving lamps required on the front of a motor vehicle. Defendants' evidence tends to show that plaintiff's automobile was a block away when Palmore made the left turn at the intersection, and that plaintiff's automobile as it proceeded west on North Avenue was traveling 35 or 40 miles an hour. According to his own testimony, plaintiff could see only about 40 feet in front of his automobile as he drove west toward the intersection.

In view of the evidence showing poor visibility and the speed at which plaintiff was traveling, the jury could find that defendant Palmore's failure to give the required signal for a left turn and the absence of the required number of lights on the truck were not contributing causes to the accident. In any event, the question whether the alleged violations of the foregoing statutes were the proximate cause contributing with others to

plaintiff's car was ... (plaintiff) was ... north of the ... miles ... what have ... witness ... about a half ... was traveling ... whether ... certain ... the ... in ... James ... the ... station ... a ... and ... avenue ... own ... his ... speed ... defendant ... left turn ... truck ... event, the ... states ...

plaintiff's injuries was for the jury to determine. Whether Palmore, the truck driver, was justified in believing that it was reasonably safe to make the left-hand turn, in view of the relative position of the truck and plaintiff's automobile with respect to the intersection and the relative rates of speed, were also questions for the jury which resolved the issues against the plaintiff. (Serletie v. Jeromell, 324 Ill. App. 233.) From a careful examination of the record we do not feel warranted in disturbing the verdict as being contrary to the manifest weight of the evidence.

Plaintiff complains of defendants' given instruction number fifteen as being defective because it assumes as a proved fact that plaintiff's automobile was being driven at a fast and excessive speed and therefore invades the province of the jury. We see no merit in this objection. Although this instruction is verbose it is substantially correct in stating the law governing the making of a left-hand turn at an intersection.

As to the instructions complained of we think they announced correct rules of law, and when they are considered in connection with all of the other instructions, the jury was fully informed as to the law applicable to the facts.

The case was fairly tried and the evidence amply supports the verdict.

For the reasons assigned, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

44002

SEBA POLK,

Appellant,

v.

ALBERT J. KAVELIN and VIRGINIA G.
KAVELIN, his wife,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover a real estate broker's commission. Trial by jury resulted in a verdict and judgment in favor of defendants. Plaintiff's motions for judgment notwithstanding the verdict and for a new trial were denied. Plaintiff appeals. No appearance or brief has been filed by defendants.

The facts out of which the controversy arises are substantially as follows. On July 15, 1945 defendant Albert J. Kavelin, executed a written contract which provided among other things that plaintiff was to act as his exclusive agent for the sale of the premises occupied by defendants known as 1336 Touhy Avenue in the City of Chicago, Cook County, Illinois. The contract further provided that the duration of the exclusive agency was "for a period of fourteen (14) days from the date hereof and thereafter for five (5) days after delivery to you [plaintiff] of written notice of cancellation."

It is undisputed that early in September 1945 plaintiff procured a purchaser, one Billian, who was ready, able and willing to purchase the premises upon the terms specified in the contract for \$14,000, and that under the terms of the contract plaintiff was entitled to a broker's commission of \$700.

SWHA POLK,

Appellant,

v.

ALBERT J. KAVELIN, his wife,
Appellees.

Appellees.

MR. PRESIDENT, JURY:

This is an action for the recovery of a sum of money.

Commission, paid by the defendant, in favor of the plaintiff.

Notwithstanding the fact that the plaintiff is a minor,

plaintiff's counsel has failed to establish that the

defendant is a minor.

The defendant is a minor.

Substantially all of the money paid by the defendant

to the plaintiff, was paid to the plaintiff's agent

other than the plaintiff.

For the sake of the record, I will state that the

1335 Tommy Avenue, Chicago, Illinois.

The contract between the plaintiff and the defendant

agency was "for a term of years, to wit, for a term of

years and months, to wit, for a term of years and months,

[plaintiff] of which the defendant is the owner.

It is manifest that the defendant is the owner of the

premises and the defendant is the owner of the premises.

Willing to purchase the premises, the defendant is willing

contract for the purchase of the premises.

plaintiff was entitled to the sum of \$100.

An examination of the record discloses that the only issue of fact presented to the jury was whether defendants orally canceled plaintiff's contract on August 12, 1945. With respect to the alleged cancellation of the contract, defendant Albert Kavelin testified that on August 12, 1945 at his home and in the presence of his wife defendant Virginia Kavelin, he attempted to give plaintiff a written notice of cancellation as provided in the contract; that plaintiff said: "It is not important; it won't be necessary." Defendant Virginia Kavelin corroborated her husband's testimony.

Plaintiff, testifying in her own behalf, denied that either of the defendants at the time and place in question mentioned giving her "a written cancellation" of her contract. Moreover, the evidence shows that several weeks after the alleged oral cancellation defendants invited Billian, the prospective purchaser, to examine the interior of their premises, and that defendant Virginia Kavelin inspected the Billian apartment with a view of occupying it in the event the Kavelins sold their premises to Billian.

As ground for reversal plaintiff urges that the improper conduct of counsel influenced the jury to resolve that issue against her. In his argument to the jury defendants' counsel stated: "I believe my clients. I have good cause to believe my clients. I asked my clients to take a lie-detector test, and they were willing to take it."

So far as the record shows there is no evidence tending to prove that defendants had agreed to submit to a lie-detector test for the purpose of determining their veracity. That defendants' counsel believed his clients or had "good cause to believe" them is an expression of his personal opinion and has

no place in the argument to the jury. (The People v. Bimbo, 314 Ill. 449; Chicago, N. S. & M. R. Co. v. Title & Trust Co., 328 Ill. 610.) The foregoing statements were not only irrelevant but were tantamount to telling the jury where the preponderance of the evidence rested. (Kenna v. Calumet, Hammond & Southeastern R. Co., 206 Ill. App. 17; Bloomington Opera House v. Peter Schoenhofen Brwg. Co., 171 Ill. App. 7.) By declaring that he had offered to subject his clients to a test of doubtful legal or scientific validity, and likewise by personally vouching for his witnesses, we think defendants' counsel clearly overstepped the bounds of propriety. (Appel v. Chicago City Ry. Co., 259 Ill. 561.)

It appears that upon cross-examination of the plaintiff defendants' counsel asked the following question: "Do you remember an occurrence where you and Mr. Frank, I think Mr. Billian was there, Mr. and Mrs. Kavelin were, Judge Quilliey was there, and I was there?" Whereupon plaintiff's counsel objected and the court sustained the objection. Defendants' counsel then stated, "You don't know what I was going to ask and you are all hot and bothered. There is a good reason why you don't want to know." Plaintiff insists that the foregoing statement of defendants' counsel suggested to the jury that plaintiff had done something improper at the first trial, and therefore the insinuation was highly prejudicial to the plaintiff. In Randall v. Randall, 225 Ill. App. 560, and Stanton v. Chicago City Ry. Co., 188 Ill. App. 502, similar baseless insinuations were condemned.

Plaintiff also complains about the characterization by defendants' counsel of the terms of the agency contract which was not in issue and derogatory remarks about the plaintiff and her motives. It would unduly extend this opinion to comment upon these statements of counsel. Suffice it to say that where, as here, the case turns upon a simple issue of fact and the case

no place in the evidence.

314 Ill. 449; 315 Ill. 449; 316 Ill. 449.

322 Ill. 410. The evidence is not relevant.

but were introduced for the purpose of

of the evidence presented. 317 Ill. 449; 318 Ill. 449.

319 Ill. 449. The evidence is not relevant.

320 Ill. 449. The evidence is not relevant.

321 Ill. 449. The evidence is not relevant.

322 Ill. 449. The evidence is not relevant.

323 Ill. 449. The evidence is not relevant.

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340 Ill. 449. The evidence is not relevant.

341 Ill. 449. The evidence is not relevant.

is a close one on the merits, defendants' counsel should not have asserted what he believed or disbelieved outside of the evidence nor unjustly aspersed an adversary witness. (West Chicago Street R. R. Co. v. Kean, 104 Ill. App. 147.)

For the reasons given, the judgment is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED
FOR NEW TRIAL.

KILEY AND BURKE, JJ. CONCUR.

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AUGUSTA MARTIN,

Appellee,

v.

LESLIE MARTIN,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

332 I.A. 331

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a proceeding to modify the terms of a divorce decree with respect to alimony. Issue was joined on plaintiff's amended petition and the cause was referred to a master. The court ordered the decree modified in substantial accordance with the master's recommendation. Defendant has appealed.

The parties married July 14, 1918. They had two children. January 21, 1936, plaintiff was granted a divorce in an uncontested proceeding on the ground of defendant's drunkenness. The decree awarded plaintiff \$15 per week permanent alimony and gave her custody of the two children. The children were of age at the time of the instant proceeding.

October 25, 1940 plaintiff filed her petition for a rule to show cause against the defendant, alleging an accumulated arrearage of more than \$1,500.00 under the terms of the decree. Defendant answered and the court modified the decree by a temporary order of November 1, 1940, reducing the weekly payments to plaintiff to \$6 per week for the male child of the parties, then still a minor. The hearing on the rule to show cause was continued. November 3, 1941 a further order was entered which recited the proceedings to that date; the controversy between the parties with respect to arrearage, if any, and its amount; and the compromise for \$300 in satisfaction of all plaintiff's claims

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to that date for alimony and child support. The next controversy between the parties began with the instant proceeding filed July 25, 1945. Plaintiff's amended petition was filed September 24, 1945. The order appealed from modified the previous allowance by requiring defendant to pay plaintiff \$50 per week commencing September 28, 1945. It also provided \$1,000 for plaintiff's attorney's fees.

The parties agree that the order of November 1, 1940 reducing the weekly payments to plaintiff is res judicata in the absence of a substantial change in the circumstances of the parties.

The first question is whether plaintiff's petition was fatally defective in failing to allege a change in circumstances. We think it is a fair inference from the allegations of the petition and the amended petition that both at the time of the entry of the decree for divorce and the subsequent modification order, plaintiff relied upon misrepresentation of the defendant as to his financial circumstances, and that a substantial change had taken place between defendant's financial circumstances, represented to her at the time, and his financial circumstances at the time plaintiff filed her petition. Moreover, plaintiff's pleadings show that at the time of the previous order she was employed and at the time of the instant proceeding she was under disability, unemployed and subjected to expense for medical treatment. We conclude, therefore, on this point that the petition as amended was not fatally defective. The defendant had an opportunity to attack plaintiff's pleadings in the trial court and having failed to do so, has waived his right to complain here.

Defendant contends the order of modification is against the manifest weight of the evidence. At the time of the November 1940 order plaintiff was employed by the City of Chicago at \$145 a month and had the care of the two children. She was living with her mother who contributed \$50 to \$60 a month toward maintenance of the household. Plaintiff testified that defendant

to that date for alimony and child support. The next controversy between the parties began with the instant proceeding filed July 26, 1945. Plaintiff's amended petition was filed September 24, 1945.

The parties agree that the order of November 1, 1940 reducing the weekly payments to plaintiff is res judicata in the absence of a substantial change in the circumstances of the parties.

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to that date for alimony and child support. The next controversy between the parties was in the instant proceeding, filed July 25, 1945. Plaintiff's answer and motion to dismiss was filed September 24, 1945.

The parties agreed that in order of November 1, 1940 regarding the weekly payments of \$10.00 in the absence of a substantial change in the circumstances of the parties.

The first motion to dismiss Plaintiff's petition was timely brought in order to bring a change in circumstances. It is said that Plaintiff's petition was filed at the time of the entry of the order of alimony and child support modification order, which was a misrepresentation of the defendant's financial circumstances, and that a substantial change in circumstances had occurred between defendant's financial circumstances, represented to the court at the time, and the financial circumstances of the time Plaintiff filed her petition. However, over, Plaintiff's petition was filed at the time of the previous order and was amended at the time of the instant proceeding and was amended to reflect the change in circumstances. She was under a duty to disclose the change in circumstances, on this point for medical treatment, a condition, and on this point that the petition was amended and not timely brought. The defendant was not obligated to attach Plaintiff's pleadings in the trial court and having failed to do so, was waived his right to demand same.

Plaintiff's answer to the order of modification is against the manifest intent of the evidence. At the time of the November 1940 order Plaintiff was employed by the City of Chicago at \$145 a month and had the care of the two children. She was living with her mother who contributed \$50 to \$60 a month toward maintenance of the household. Plaintiff testified that defendant

at the time stated he was not earning any money; that she did not know what his income was then; that she worked for the City from February 1937 until February 1943, when she joined the WACS; that she left the Army in December 1944; that she thereafter entered Veterans Hospital at Hines, Illinois and was treated for pernicious anemia and arteriosclerosis; that while there she was awarded disability from the City amounting to \$3.00 a day; that her compensation from the Government is \$46 per month; that she is under the doctor's care and unable to work; and that she has a further income of \$106 per year in dividends from stock purchased with an inheritance from her mother and with her "mustering out" pay from the Army. A doctor testified that plaintiff suffers from weakness, lack of resistance, frequent colds, bronchitis, breathlessness, has a pallor, rapid heart beat and low red and white blood count; that the question of recovery is indefinite and that she is unable to do constant work; and that her medical expenses range from \$40 to \$50 per month.

It was stipulated by the parties that all pleadings in the case should be evidence to be considered by the parties.

In his sworn answer to the petition for the rule to show cause in 1940, defendant stated that he was not able to comply with the decretal order; that the tavern he owned on East 53rd street in Chicago was a losing venture; that his interest in the General Music Company produced no income whatsoever; that he had realized no income from the distributing agreement which he had with the Mills Novelty Company; and that his net income was \$35 a week.

In defendant's brief it is conceded that he paid income taxes on a 1940 income of between \$8,000 and \$10,000. At the time of the instant hearing he owned real estate which he testified

was valued at \$2,000 and juke boxes valued for insurance at \$17,800. His income from the General Music Company through an operating agreement covering defendant's juke boxes, grossed over \$15,000. His balance in the Niles Center State Bank at the time of the hearing was more than \$3,000 and in the Mercantile National Bank almost \$1,700. He said he owned a Buick automobile and had the use of a Cadillac which he said was not owned by him but owned by a roomer in defendant's building at 6710 Normal Boulevard, although the roomer now lives in California and the Cadillac carries a Skokie, Illinois license, and that he sometimes sleeps in his office at Skokie and sometimes at the Normal Avenue address. An exhibit introduced on behalf of the defendant would indicate that his net income from the General Music Company was about \$6,500. This was after an allowance for depreciation of 25 percent of the value of the juke boxes each year. It is admitted that since two-thirds of the juke boxes at the time of the hearing were more than four years old, the validity of this allowance was doubtful. Defendant claimed an expense of \$5,500 not reflected in the exhibit. Testimony with reference to this expense and with reference to the exact relationship of defendant to the General Music Company is indefinite. He lacked books or records of his business and his income. We think there is sufficient testimony in the record for the finding of the court that the defendant's financial condition had greatly improved since November 1940 and that his net earnings exceeded \$10,000 a year.

Defendant says that in 1940 plaintiff had their son Harry with her and that he was of age at the time of the instant hearing and that it is undisputed in the record that plaintiff's income at the hearing was about 17 cents less than her income

in November 1940. After the entry of the November 1940 order, Harry began to work at his father's tavern for \$6 a week and subsequently had another job which paid him \$30.00 a week. The defendant says that he did not pay plaintiff "a cent" after the \$300 compromise in 1941. So far as the comparative figures on plaintiff's income go, it must be kept in mind that in 1940, she was living with her mother who contributed to her expense and that the disability payments from the City, which she was receiving at the time of the order appealed from, are temporary. Moreover, her needs because of her illness are greater.

Defendant refers to plaintiff's testimony that he gave her a financial statement of the Martin-Lindelof Distributing Company for September 1940, showing a gross income for 9 months of more than \$100,000 and a net income of more than \$14,000. This would indicate she did not rely on misrepresentations of his income. The statement is in evidence as plaintiff's exhibit. The statement is inconsistent with the sworn pleading which defendant filed at that time. It was not then before the court and we assume that the November 1940 order was based on what was before the court. Furthermore, defendant testified at the hearing in the instant proceeding that he was not earning anything in 1940; and that the Company "positively" did not have the income shown on the financial statement. It is plain from the testimony of both parties that in 1936, and for several years thereafter, defendant was reinvesting what he earned in, and accumulating, juke boxes.

While the court does not make the express finding that plaintiff's needs have changed since November 1940, it is inferable from the findings, referring to her war service, her subsequent

ill-health and her medical expenses. Moreover, the order expressly approves and confirms the master's report which is more detailed in its finding. The instant order expressly modifies the decretal order as modified by the November 1940 order.

We find that the record shows a substantial material change in plaintiff's needs and defendant's financial circumstances between November 1940 and the order of December 2, 1946 appealed from. We think that the court's findings are based upon the evidence and that we would not be justified in setting aside the findings of the Master as approved by the Chancellor, on this question of fact. In White v. White, 312 Ill. App. 383, cited by defendant, this court decided that there was no substantial change in the circumstances of the parties which justified reducing plaintiff's alimony allowance. The order of reduction in the husband's favor was reversed.

Defendant contends that the alimony order is excessive, saying that added to her present income the allowance would give plaintiff an income of about \$360 a month. He says the only increase needed as shown by the evidence is plaintiff's medical expenses. The evidence shows that plaintiff has lost the monthly income she had from her mother. This fact, her medical expenses, the nature of the disability allowance from the City and the increased cost of living preclude us from any finding that the allowance is excessive. There is, moreover, as plaintiff points out, the question of income taxes on the allowance.

Defendant finally contends that the allowance of plaintiff's attorneys fees is erroneous as a matter of law. He refers us to Smith v. Smith, 249 Ill. App. 633; Lehmann v. Lehmann, 225 Ill. App. 513; and Gerson v. Mathes, 252 Ill. App. 607. The

Smith and Gerson cases were written by the late Mr. Justice Matchett of this court. In those cases this court was disposed against any allowance for attorney's fees after the decree for divorce severed the relationship of husband and wife. In Dobson v. Dobson, 320 Ill. App. 687, Mr. Justice Matchett adopted the changed view of this court shown in Slezak v. Slezak, 293 Ill. App. 489, and Wright v. Wright, 317 Ill. App. 607. These later cases held that a wife is entitled to an allowance for solicitor's fees where wilful disobedience or failure of the husband and wife necessitated proceedings to enforce alimony payments. The Supreme Court has not definitively passed on the precise question before us, although in Stillman v. Stillman, 99 Ill. 196, there is dictum in favor of the allowance. In any event under the circumstances of this case where plaintiff's additional needs motivated the proceeding and in view of the evidence of what transpired in November 1940, we feel safe in concluding that the allowance of attorney's fees to plaintiff was not erroneous as a matter of law. There is no question raised as to the excessiveness of the allowance.

For the reasons given the order of the Superior Court is affirmed.

ORDER AFFIRMED.

LEWIS, P.J. AND BURKE, J. CONCUR.

Smith and Jones

Relationship of

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PAUL DITTMANN,

Appellee,

v.

WESTFIELD HOMES, INC., a
corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action by a salesman for real estate commission. The court without a jury heard the testimony and found, and entered a judgment, for plaintiff for \$370.60. Defendant has appealed. Plaintiff has filed no brief in this court.

The question is whether the court's finding is against the manifest weight of the evidence.

Plaintiff's employment with defendant began in January 1944 and ended the latter part of May, 1946. He worked on a commission basis and was paid weekly in accordance with a weekly Commission Statement. The statement for the week of May 15, 1946 showed total commission of \$820.60, earned commission \$820.10, and deferred commission \$18.50. It is admitted that the defendant paid plaintiff \$450 on this statement. The judgment appears to represent the difference between total commission and the admitted payment on the account.

The defense was that the account sued upon was not an account stated but merely a tentative weekly account subject to revision. The position of the defendant was that there were two revisions made totaling \$448.50.

The case for the plaintiff consisted of a Commission Statement of May 15, 1946 and testimony from which the inference

PAUL DITTMANN,

Respondent,

v.

WESTFIELD BANK, INC.,
Corporation,

Appellant.

MR. J. J. ...

This is an appeal from a judgment of the Circuit Court of Cook County, Illinois, entered on January 12, 1944, in favor of the respondent.

The court without a jury heard the testimony of the parties and entered a judgment for the plaintiff, the Westfield Bank, Inc., in the sum of \$10,000.00, with interest thereon from the date of the judgment to the date of payment.

The plaintiff appeals from this judgment on the ground that the same is against the manifest weight of the evidence.

The question for the court is whether the plaintiff has shown that the manifest weight of the evidence is in its favor.

The manifest weight of the evidence is the weight of the evidence as it appears to the mind of the trier of fact.

Plaintiff's evidence is that on January 1, 1944, he worked on a

1944 and ended the year on December 31, 1944. He worked on a

commission basis and his salary was \$10,000.00 per year. He was paid weekly

Commission Statement. The statement for the year of 1944 showed total commission of \$10,000.00, and deferred commission of \$10,000.00.

Plaintiff showed total commission of \$10,000.00, and deferred commission of \$10,000.00.

and deferred commission of \$10,000.00. The statement for the year of 1944 showed total commission of \$10,000.00, and deferred commission of \$10,000.00.

said plaintiff \$10,000.00 on the 1st of January, 1945, and judgment was entered for the plaintiff.

represent the difference between the commission and the deferred commission.

payment on the account.

The balance of the account was \$10,000.00 and was paid to the plaintiff on January 1, 1945.

account stated but rarely a tentative weekly account subject to

revision. The action of the plaintiff was that there were

two revisions made totaling \$10,000.00.

The case for the plaintiff consisted of a Commission

Statement of May 15, 1945, and testimony from which the inference

is that the balance due was \$370.60. Among the sales by plaintiff were a vacant lot sold to Mr. and Mrs. Nybakken in May of 1945, and another sold to Mr. and Mrs. Woerner in June, 1945. These sales are represented in the weekly statement of May 8, 1945 and of June 27, 1945, respectively. His commissions on these sales represented \$216.75 and \$231.75, respectively.

Defendant's employee Coakley testified that he employed plaintiff and at the time explained the commission policy to him and also explained defendant's practice of charging back refunds. He said that salesmen were paid once a week and drawings against the weekly account were discouraged, and that salesmen were paid the amount of commissions earned in the weekly statement unless there was money owing to the defendant. He said that plaintiff was advised that in the event purchase money was refunded subsequent to the signing of the contract of sale the amount of the refund would be debited to the salesman's account. The plaintiff in rebuttal denied any conversation with Coakley with respect to the commission. It does seem unlikely, as defendant points out, that the question of plaintiff's compensation was not discussed when he was employed.

Mrs. Woerner testified that when plaintiff sold her the vacant lot he said that after priorities were taken off in October a home would be started there "For us, in fact I imagine for the whole community. I don't know." Their money was refunded May 21, 1946 by defendant through "Mr. Goldman, and he said if we thought we could get a home they would gladly refund our money." This witness said the reason they gave for requesting the refund was that "We had to have a home and we needed that money." Mrs. Nybakken testified that at the time she and her husband purchased

the lot from plaintiff he said they could "have a home" but that it would be better to wait until "next March," because "We expect to be building here then." She said, "We did not get the home built that we had expected to get." Goldman refunded their money May 21, 1946 "because we needed that to put down on another place." She said prices were not discussed; that plaintiff said he would get them together with an architect; that the cost of the house would have to exceed \$5,000; that there was talk of wells and cesspools; and that plaintiff told them to get in touch with him when they "got ready to build a house." They did not thereafter get in touch with him or talk to him about building the house.

Defendant's secretary-treasurer testified that he supervised payment of the commission and that plaintiff was paid \$400 on the account of May 15th. There was subsequently a further \$50 payment. There was an attempt to show, by using a copy, that a debit statement was sent to plaintiff on account of the Woerner and Nybakken refunds. On objection, the court excluded the testimony. Defendant's counsel said that he would bring the books in "right away" to show the debit. The books were not produced. There was accordingly nothing to show that the Commission Statement issued on was not a final statement of plaintiff's account.

The court in making its finding called attention to the lack of foundation for introducing secondary proof of the debit statement which defendant attempted to show was mailed to plaintiff; to the failure to produce defendant's books to show a debit to the account of plaintiff; and the failure to introduce the contracts between defendant and the Woerners and Nybakkens so as to prove the right of those purchasers to the refunds that

were given them. The court expressed its view that the refunds were made not because defendant was legally obliged to make them but in pursuance of a goodwill policy. The court concluded that the plaintiff, on the evidence produced, should recover.

We cannot say that the court's finding was against the manifest weight of the evidence.

Judgment is, accordingly, affirmed.

JUDGMENT AFFIRMED.

LEWIS, P.J. AND BURKE, J. CONCUR.

were given them. The first of these was a letter from the
 State Department, dated January 1, 1941, in which it was
 stated that the United States was not at war with Germany.
 The second was a letter from the War Relocation Authority,
 dated January 1, 1941, in which it was stated that the
 United States was not at war with Germany.

Very truly yours,

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332 L.A. 662

Gen. No. 10139.

Agenda No. 1.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
FEBRUARY TERM, A. D. 1947.

| | | |
|----------------------------|---|----------------|
| REINHOLD A. WEISE, |) | |
| Appellant, |) | |
| vs. |) | Appeal from |
| |) | Circuit Court, |
| MARY WACHSMUTH, |) | Will County. |
| MAE MAGNUS, LILLIE KELLER, |) | |
| Appellees. |) | |

WOLFE,-- P. J.

Reinhold A. Weise filed a complaint in the Circuit Court of Will County, in which he charged that the defendants, Mary Wachsmuth, Mae Magnus and Lillie Keller had falsely sworn to a complaint before Edgar E. Johnson, a Justice of Peace in Joliet, Illinois, and had procured a warrant for his arrest, charging him falsely with disorderly conduct, or some other offense; that he was arrested under said warrant and confined in jail for four days by the Sheriff of Will County; that the defendants knew the charges against him were false and malicious; that they caused the plaintiff's imprisonment in the Will County jail; that the charges were dismissed by the Justice of Peace without a trial and that the defendants had abandoned the prosecution of the same; that by reason of such false charges and false imprisonment, the plaintiff had been greatly damaged to the

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a very important document, as it contains the President's annual message to Congress. The letter is written in a formal, dignified style, and it is one of the most important documents in the history of the United States.

2. The second part of the document is a letter from the Secretary of the Treasury to the President, dated January 10, 1862. It is a very important document, as it contains the Secretary's report to the President on the state of the Treasury. The letter is written in a formal, dignified style, and it is one of the most important documents in the history of the United States.

3. The third part of the document is a letter from the Secretary of the Navy to the President, dated January 10, 1862. It is a very important document, as it contains the Secretary's report to the President on the state of the Navy. The letter is written in a formal, dignified style, and it is one of the most important documents in the history of the United States.

4. The fourth part of the document is a letter from the Secretary of the War to the President, dated January 10, 1862. It is a very important document, as it contains the Secretary's report to the President on the state of the War. The letter is written in a formal, dignified style, and it is one of the most important documents in the history of the United States.

5. The fifth part of the document is a letter from the Secretary of the Interior to the President, dated January 10, 1862. It is a very important document, as it contains the Secretary's report to the President on the state of the Interior. The letter is written in a formal, dignified style, and it is one of the most important documents in the history of the United States.

6. The sixth part of the document is a letter from the Secretary of the Agriculture to the President, dated January 10, 1862. It is a very important document, as it contains the Secretary's report to the President on the state of the Agriculture. The letter is written in a formal, dignified style, and it is one of the most important documents in the history of the United States.

7. The seventh part of the document is a letter from the Secretary of the Commerce to the President, dated January 10, 1862. It is a very important document, as it contains the Secretary's report to the President on the state of the Commerce. The letter is written in a formal, dignified style, and it is one of the most important documents in the history of the United States.

amount of \$5,000.00.

The defendants filed their answer and denied the allegation of the complaint. A hearing was had and at the close of plaintiff's case, the Court sustained a motion to direct a verdict in each of the defendants' favor. Judgment was entered in favor of the defendants and against the plaintiff for costs, from which the plaintiff has perfected an appeal to this Court.

The case was orally argued before us. The attorney for the appellant conceded that if the complaint charges false imprisonment, then the Court properly held that the plaintiff had not proven his case and properly sustained the motion of the defendants for finding in their favor.

It is contended by the appellant that his complaint charges malicious prosecution instead of false imprisonment, and the case was tried on that theory in the trial court. The record does not sustain the appellant in this contention. After the plaintiff's attorney had made his opening statement, the Court asked the attorney for the defendants if he wished to make a statement. To which Mr. Gray, the attorney replied: "I understand that the record does show this is for false imprisonment, and I ask leave to withhold my statement, until a conclusion of the plaintiff's case." To which the Court replied: "All right." Again the Court said to Mr. Gray, "I don't know what your contention is, but the plaintiff is confronted with the responsibility to prove that there was some kind of proceeding, which he claims to be false arrest." After the plaintiff had rested his case, and the defense had presented motions for judgment, Mr. Gray stated: "I think the law will substantiate our claim that we

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are entitled to judgment on the plaintiff's case." The Court asked: "For what reasons?" "Is this false imprisonment, or malicious prosecution?" Mr. Gray stated: "False imprisonment." Later, the Court asked Mr. Orr, the Attorney for the plaintiff, whether the mother participated in the arrest of Mr. Weise. Mr. Orr replied: "That she was trying to get the plaintiff arrested; that she was trying to get Mr. Boers to arrest him; that she was trying to have him arrested before she did get him arrested; that she was the man behind the gun," and the Court replied: "That he was unable to find in the testimony, that the mother was connected with a warrant for the arrest." The Court was certainly under the impression that the case was tried upon the theory that the complaint charged false imprisonment instead of malicious prosecution.

There is a well settled rule of law that a pleading will be construed most strongly against the pleader, and certainly the trial court would be justified in construing this complaint as being one for false imprisonment instead of malicious prosecution. *Blackaby vs. City of Lewistown*, 265 Ill. App. 63; *Schneider vs. Smith*, 271 Ill. App. 414. The case having been tried upon the theory that the complaint charged false imprisonment instead of malicious prosecution, the party cannot present his case to the trial court on one theory, and the Court of review on another theory. *Lewy vs. Standard Elevator Co.*, 296 Ill. 295; *Bishop vs. Bucklen*, 322 Ill. App. 529. After an examination of the complaint in question, we are satisfied that the pleadings stated a good case of false imprisonment, but does not state a good cause of action for malicious prosecution. It is our conclusion that the Court properly held that the proof, as offered, did not sustain a case of false imprisonment, and the judgment appealed from is affirmed.

Judgment affirmed.

6/16
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Notes:

Gen. No. 10196.

Agenda No. 13.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
OCTOBER TERM, A. D. 1947.

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| ELMER P. KINNEY, |) | |
| Appellee, |) | |
| vs. |) | Appeal from |
| |) | Circuit Court, |
| LOWELL HALL, |) | Carroll County. |
| Appellant. |) | |

WOLFE,-- P. J.

Elmer P. Kinney was the owner of a farm in Carroll County. Lowell Hall was a tenant on the farm, and they owned the stock and farm machinery and grain jointly, each having a fifty per cent interest in the same. When Hall's term as tenant, was about to expire Kinney went out to the farm and they divided the cattle. There were eleven cows and heifers. It was agreed between the parties that, to have an equal division of the cattle, Kinney would take one three-year old heifer at an agreed price of \$175.00 for which he would pay Hall one-half or \$87.50. The cows were then placed into two pens. Hall made the division and Kinney then took his choice of the pens, and he decided to take the north pen. In the south pen it is claimed by Kinney that there was an older cow with a defective udder.

A short time later, Hall moved to an adjoining farm and

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Kinney went down to his farm and claims he discovered that the cow with a defective udder, which had been in the south pen, had been switched over to his pen and a young cow, valued at \$175.00 had been taken out of his pen and moved by Hall to the farm, which he was then occupying. Kinney then started a suit in replevin for this cow, a milking machine and a bushel of clover seed. The Constable made his return in which he stated that he had recovered the clover seed, milking machine and the cow. At the hearing of the case before a Justice of Peace, the Court found in favor of Kinney, and entered judgment for him for the price of the cow. Hall took an appeal to the Circuit Court, and the Circuit Court likewise found in favor of Kinney and entered judgment for the price of the cow and costs of suit against Hall. Judgment was entered accordingly and Hall has perfected an appeal to this Court.

The evidence shows that, at the time that Kinney went out to the farm, when they made a division of the cattle, it was agreed that the milking machine would stay on the farm, and would be there for demonstration purposes and for sale. It also shows that the clover seed had been divided, one-half for Kinney, and one-half for Hall. The evidence also preponderates in favor of Kinney, that there had been an exchange of the young cow, and the diseased cow. It is insisted, however, that this was partnership property, and therefore replevin would not lie. It is conceded by the appellee that this is the usual rule in such cases, but does not apply to the facts in this case, because the young cow had been separated and placed in Kinney's pen, therefore, the title was vested in Kinney. The milking machine was to remain on the farm to be sold, therefore, Kinney had a special interest in the machine. The clover seed had been divided, so that

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the title really was in Kinney. We are satisfied that the evidence in this case justifies this conclusion.

The trial court heard the evidence and saw the witnesses, as they testified. He saw fit to give more credence to the testimony of Mr. Kinney and his witnesses, than that of Mr. Hall and his witnesses. Unless we can say that the Court's finding is manifestly against the weight of the evidence, we would not be justified in reversing the judgment. It is our conclusion that the evidence fully supports the findings of the trial Court, and the judgment should be and is affirmed.

Judgment affirmed.

1. *Phragmites australis* (Cav.) Trin. ex Steud.

Gen. No. 10204.

Agenda No. 19.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1947.

IRVIN GRIFFIN,)
Plaintiff-Appellee,)

vs.

Appeal from
Circuit Court,
Winnebago
County.

CHICAGO-ROCKFORD MOTOR EXPRESS,
INC., a Corporation, Defendant-
Appellant, and BRUNO CAGNONI
and ALFRED CAGNONI, Co-partners,
doing business as Over-Nite Motor
Service, Defendants-Appellees.

WOLFE,-- P. J.

Irvin Griffin was the owner of a tractor-trailer truck, which on July 21, 1944, was being driven in a westerly direction on a paved highway a few miles East of Belvidere, Illinois. The defendant, Chicago-Rockford Motor Express, Inc., through its agents, was operating a tractor-trailer in an easterly direction at that time and place. The defendant, Bruno Cagnoni and Alfred Cagnoni, Co-partners, doing business as Over-Nite Motor Service, were the owners of a tractor-trailer truck, which was being operated by their agent and servant, in a westerly direction along the same highway at the time and place. There was a collision between the trucks in which all three were damaged.

Irvin Griffin started suit against the Chicago-Rockford Motor Express, Inc., and against Bruno Cagnoni and Alfred Cagnoni,

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Co-partners, doing business as Over-Nite Motor Service for the damage that he sustained because of the collision. He alleged the negligence of the defendants caused the damage to his truck.

The Chicago-Rockford Motor Express, Inc., started suit in the same Court against the Over-Nite Motor Service for damage that it sustained because of the collision. The Over-Nite Motor Service filed a counterclaim against the Chicago-Rockford Motor Express, Inc., for damage to its vehicle. The suits were consolidated, and tried before a jury. The jury found in favor of Irvin Griffin, and against the Chicago-Rockford Motor Express, Inc., and assessed his damages at \$3,035.50. Judgment was entered on the verdict, and an appeal has been prosecuted to this Court, by the defendant, Chicago-Rockford Motor Express, Inc. It is insisted by the appellant that there is no evidence in the record to sustain the allegation of the complaint; that the plaintiff was in the exercise of due care and caution for the safety of his tractor-trailer truck, and that the plaintiff was guilty of negligence, as a matter of law, because the evidence shows that the plaintiff's truck was being driven within 200 feet of the truck of Over-Nite Motor Service.

Mr. Sam Robbins, the driver of the Griffin truck, detailed how he was driving the truck and how the accident occurred, and if the jury saw fit to believe his testimony, they would certainly be justified in finding that the plaintiff was in the exercise of ordinary care and caution for the safety of his vehicle, and that the negligence of the driver of the Chicago-Rockford Motor Express, Inc., in driving its truck on the left side of the black line of the pavement, was the proximate cause of plaintiff's damages.

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In one place Mr. Robbins stated in his testimony that he was driving between 300 and 500 feet back of the Over-Nite Motor Service truck, and on cross-examination he testified at the time of the accident that he was about 200 feet. The jury was properly instructed by an instruction tendered by the appellant, relative to the law in such cases. The jury, by its verdict has found that even if the distance of the truck was less than 300 feet of the Over-Nite Motor Service truck, it was not the proximate cause of the injury to the Griffin truck, and could not be construed as negligence on the part of the plaintiff.

The Court gave to the jury the following instruction: "The Court instructs the jury that it was the law of the State of Illinois at the time of the accident in question, that any person driving, managing or operating a motor vehicle, should so drive, manage and operate said motor vehicle as not to endanger the life or property of any person or persons who are exercising reasonable care for their own safety and who are rightfully on the public highway, and the court further instructs the jury that this rule of law was binding upon all parties to this cause at the time of the collision in question in this suit." Keeping in mind the fact that there are three suits combined in one, we find no error in the Court's giving this instruction.

Complaint is made in regard to plaintiff's instruction No. 15. "If you believe from the preponderance of the evidence, under the instructions of the court, that the plaintiff, Griffin, has proved that the defendant, Chicago-Rockford Motor Express, Inc., a corporation, was guilty of negligence as defined in these instructions, and that such negligence, if any, caused or proximately

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contricted to cause the accident and damage complained of in this case, and that plaintiff and the servant of the plaintiff were then and there and prior thereto, in the exercise of ordinary care for their own safety and the safety of the equipment of the plaintiff, then you should find the defendant, Chicago-Rockford Motor Express, Inc., a corporation, guilty." The criticism of this instruction is that the negligence complained of should be that charged in the complaint, which is that the defendant, through its agent, negligently drove its truck over the center lined the highway that was the proximate cause of the injury. We are inclined to think that the other instructions cured this defect, if any, but the appellant is not in a position to raise the question, as appellant's instruction No. 20 used practically the identical language as used in plaintiff's instruction No. 15. A party cannot complain of an alleged error in an instruction, where the same error is contained in an instruction given at its request. *Commissioners of Lincoln Park vs. Schmidt*, 375 Ill. at Page 474.

It is also contended by the appellant that the Court erred in admitting evidence relative to the amount of damages that the plaintiff sustained. We find no merit in this contention. It is our conclusion that the defendant received a fair and impartial trial, and the judgment appealed from should be affirmed.

Judgment affirmed.

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